

THE BRITISH BACKGROUND OF THE AMERICAN
THEORY OF JUDICIAL REVIEW.

A dissertation submitted to the
University of Edinburgh for the
degree of Doctor of Philosophy.

May 12, 1938.



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Preface

Introduction

PREFACE.

President Roosevelt and the U. S. Supreme Court

The Incorporation of Judicial Review in the
American System

This thesis is the result of two year's research in the libraries of Edinburgh, Harvard, and Stanford Universities, the National Library of Scotland, and the library of the British Museum.

The writer wishes to acknowledge his indebtedness to Professor D. Oswald Dykes for his advice and encouragement during the period of research. If this thesis reveals painstaking work, it should be made a matter of record that it is in response to the influence of a kind and scholarly counsellor.

The writer is also indebted to J. S. P. Mackenzie, Esq., for reading and criticizing the thesis, and to Franklin Poole, Esq., Librarian of the New York City Bar Association, for his assistance in forwarding the New York Bar Reports for 1915, 1916, and 1917.

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INTRODUCTION.

Since 1803 there has been discussion over the powers of the Supreme Court of the United States. Those who favor judicial review of legislative acts regard the Justices of the Supreme Court as the guardians of the Constitution; those who oppose it speak of "judicial usurpation of executive and legislative powers."

When Sir Henry Maine stated, "The success of this experiment (judicial review) has blinded men to its novelty. There is no precedent for it, either in the ancient or in the modern world,"⁽¹⁾ he accredited the founders of American constitutionalism with too much originality. Certainly none other than the American nation can be held responsible for its success or failure in the United States, yet it is of contemporary interest to understand the contributions which other countries, and in particular, Great Britain, have made to this doctrine.

Whenever judicial review has been attacked, the supporters of the theory have claimed that its foundation is deeply rooted in the past.

(1) Maine, Popular Government (N. Y. 1886) p. 217.

For example, in the records of the New York State Bar Association Reports for 1915 one reads:

The American Revolution was a lawyers' revolution to enforce the principle laid down in Lord Coke's, Lord Hobart's and Lord Holt's decisions that acts of Parliament against common right or in violation of the natural liberties of Englishmen were void.

It is submitted that when such astounding statements are made by a committee of lawyers of the New York Bar, the evidence to support such statements should be investigated and evaluated. When and where did Lord Coke, Lord Hobart, and Lord Holt lay down such a principle?

Chief Justice Marshall stated that the written constitution was the fundamental law of the land. Is there British authority for this statement? What is the British background of the doctrine of judicial review?

The writer realizes that the British people are beginning to tire of the tendency upon the part of Americans to justify their customs and institutions on the ground that the customs and institutions originated in Great Britain. Recently newspapers reported that the new American Ambassador was well liked because he did not look for his ancestors' tombstones the day after he arrived at Southampton.

PRESIDENT ROOSEVELT AND THE

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UNITED STATES SUPREME COURT.

"No feature in the government of the United

States," wrote Lord Bryce over a quarter of a century

ago. "has awakened so much curiosity in the European

mind, caused so much discussion, received so much

admiration, and been more frequently misunderstood,

than the duties assigned to the Supreme Court and the

debates in the Senate and House of Representatives,

many references were made to British history and

British constitutional law. Senator Borah, for ex-

ample, stated on February 1, 1937, "The effort to

establish and maintain an independent judiciary

long antedated the adoption of our Federal Consti-

tution...Far back in English history, still read

with unfailing enthusiasm, Sir Edward Coke...flung

the laurels of a lifetime/of the King..." The Magna

Carta and other constitutional documents were fre-

quently mentioned. Thus because there is a con-

nection between this thesis matter and the con-

temporary political struggle in America, the writ-

er has included the chapter on President Roosevelt

and the United States Supreme Court. With the per-

mission of Professor D. Oswald Dykes, this chapter

was published in the Scots Law Times, Dec. 4, 1938.

(1) Bryce, The American Commonwealth, chap. XIII.

(2) Scots Law Times, Dec. 4, 1938.

PRESIDENT ROOSEVELT AND THE
UNITED STATES SUPREME COURT.

"No feature in the government of the United States," wrote Lord Bryce over a quarter of a century ago, "has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution."⁽¹⁾

Lord Bryce is not the only Scotsman who has been interested in the feature of American government which has been the storm centre of that nation's politics during the past few months. James Wilson, recognised by many as the greatest constitutional lawyer of the American constitutional convention, and later an Associate Justice of the Supreme Court, was born and educated in Scotland. In a less direct way, the famous Adam Smith was said to have influenced decisions of the Supreme Court, in that the concept of unlimited freedom of making contracts, long protected by that high tribunal, has been traced to the influence of the economist's doctrine commonly called *laissez faire*.⁽²⁾

One/

(1) Bryce, *The American Commonwealth*, chap. XXII.

(2) Pound, Roscoe, Yale Law Review, Vol. 18, "Liberty"

One American author has claimed that the doctrine of natural rights, and the social contract, were introduced to the American colonists by independent sects influenced directly by the Scottish Presbyterians. (1)

Forty-seven years ago the Juridical Review published an article on the Supreme Court of the United States which, in the eloquent language of the nineteenth century, praised the Supreme Court as the keeper of "the light that burns with a constant radiance upon the high altar of American constitutional justice." (2)

How different was the tone of President Roosevelt when he declared on 17th September last, in his speech commemorating the 150th anniversary of the signing of the American Constitution: "Nearly every attempt to meet demands for social and economic betterment has been jeopardised or actually forbidden by those (Supreme Court Justices) who have sought to read into the Constitution language which the framers refused to write into the Constitution."

The effort of President Roosevelt to reconstitute the Supreme Court may be explained to a large extent by the failure of the Supreme Court to declare certain legislative Acts of the "New Deal" programme, such as the National Recovery Act and the Agricultural Adjustment/

(1) Martin, Introduction to the American Constitution, p.273. .

(2) Phelps, "The Supreme Court of the United States." Juridical Review, Vol. II. p.122.

Adjustment Act, in accord with the provisions of the written Constitution. The action of the President is based, to a degree, on political expediency; but not entirely of contemporary significance is the issue of judicial supremacy. At various periods in American history this feature has been the object of political debate. The Court has endured many unfavourable reactions of public opinion and of chief executives - notably Jefferson, Jackson, Lincoln, Johnston, and Roosevelt.

It is commonly believed, even in the United States, that the written Constitution gave the express right to the Supreme Court to declare Acts of Congress void, if in the opinion of the Justices the Act was in conflict with the written Constitution. This is not so.

It is known that certain leaders of the constitutional convention, and in particular Alexander Hamilton, believed in the doctrine of judicial review of legislative Acts. In 1788 Hamilton wrote: "A Constitution is, in fact, and must be regarded by the judges as, fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the legislative body."⁽¹⁾

Not until 1803, however, in the case of *Marbury v. Madison*,⁽²⁾ did the Supreme Court declare its right to pass/

(1) Federalist Papers, Number LXXVIII.

(2) 1 Cranch 137 (1803).

8.

pass on the constitutionality of Congressional Acts.

The argument which Chief Justice Marshall offered to support his decision has not always been considered very strong, and one is led to believe "that the best judges, in passing on constitutional questions, are not always uninfluenced by political considerations."⁽¹⁾

It would be unfair, however, to claim that Marshall's decision, any more than President Roosevelt's plan, was prompted solely by political considerations. In Marshall's day the great need was for a strong national government, and a declaration of the Supreme Court's right to pass on the constitutionality of Congressional Acts strengthened federal control.

In Franklin Roosevelt's day the great need is for social and economic betterment, and Roosevelt has chosen to align himself with those who believe a more liberal interpretation of the Constitution will insure progress. Each man has pressed his point within the sphere of his governmental position.

What is Roosevelt's plan? The newspapers have called it "packing" the Court. "Reconstituting," it is submitted, is a more neutral term. Briefly, President Roosevelt's plan would provide for retirement of Justices who have reached the age of seventy, or, if they do not choose to retire, an additional Justice would be appointed to the Court for every Justice who has decided/

(1) See Mathews, The American Constitutional System, p. 210 and following, for an account of the decision.

decided to remain on the bench after he has reached seventy. The Court at present could be increased from nine to fifteen members. The President later modified his plan, providing that one new Justice be appointed every year for the next six years (in case the Justices over seventy are still living and do not choose to retire). Since the President, with the approval of the Senate, has the right to appoint new Justices, President Roosevelt could thus appoint men who shared his views regarding the constitutionality of his "New Deal" programme. To many Americans this would mean executive rather than judicial supremacy.

The Supreme Court has not always had nine members. By an Act of 13th February 1801 it was provided that on the death or resignation of a Justice the vacancy should not be filled, which would leave the Court at five members. As none died until the passage of the next law, this Act did not create any change. In 1807 the Supreme Court membership was increased to seven, and it remained at this figure for thirty years. In 1837 the membership was increased to nine. In 1865 the Court had an additional member added, bringing its number to ten, the largest number ever to sit on the Bench. By the Act of 10th April 1869 the Court Justices were placed at nine, after they had been reduced to seven in 1866 by deaths. Since 1869 the number has remained constant.

Why/

Why did Congress refuse to pass President Roosevelt's proposal? Congress is sensitive to public opinion. In 1935 the Institute of Public Opinion published figures indicating that 53 per cent. of the people favoured the Supreme Court's review of disputed Congressional Acts, 16 per cent. had no opinion, and only 31 per cent. favoured some check on the power of the Supreme Court.

In 1937, after the President had made his proposal to reconstitute the Supreme Court, the Institute again, through a process of sampling, endeavoured to test public opinion. Out of nearly 400,000 consultations, 255,136 people indicated they were opposed to the President's plan, while only 131,320 supported Mr Roosevelt.

These figures indicate that while only a slight majority favour judicial review, a two-thirds' majority oppose the specific plan proposed by the President.

Why should the American people oppose the President on this issue shortly after they had returned him to office by an overwhelming majority? Using the words with which Professor D. Oswald Dykes has described the British Crown, the American people regard their Supreme Court as "an element of stability in a rapidly shifting political kaleidoscope." They may oppose a single decision, but see wisdom in many others. There is a feeling/

feeling of safety in knowing that a non-political body is prescribing the constitutional limits of Congressional Acts. A study of Supreme Court decisions reveals a tendency to respond, slowly yet surely, to the demands of an enlightened public opinion.⁽¹⁾ While President Roosevelt admits this, he condemns it as a "twenty year lag."⁽²⁾

of Bryce

A second reason for opposition to the President's proposal is because he was silent about the Court during his re-election campaign, but waged open warfare on the Court when his own position was again secure. The claim that he had received a mandate from the people to reconstitute the Supreme Court was not supported by the evidence. However astute the President's move was on grounds of political strategy, it did not meet with public approval. Lincoln opposed a certain decision of the Supreme Court, but he made his criticisms during the election campaign. In 1924 Robert La Follette, an independent candidate for President, advocated submitting to the people a constitutional amendment providing that Congress might effectively enact a statute over judicial veto. Like Lincoln, he raised the question during his election campaign.

A third reason for the failure of President Roosevelt's proposal is that it is only one of many plans which/

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- (1) Consult Bryce, The American Commonwealth, Vol.I. p.274, and Sharp, "Movement in Supreme Court Adjudication," Harvard Law Review, Vol.46, p.361.
- (2) See text of President Roosevelt's Address on the Constitution, 17th September 1937 (printed in the New York Times, 18th September, 1937).

which have been suggested, and those who have been united in the belief that the Supreme Court has exerted too much authority have not been agreed on means of curbing the tribunal's power.

Since Thomas Jefferson's day, when his political associates, perplexed by the practice of the Federal Courts of declaring State laws unconstitutional, suggested that judges give their opinions seriatim, after the manner of the English Courts, there have been proposals to change the Supreme Court.

During the post-Civil War period, several attempts were made to have Congress pass an Act declaring that no Court had the right to declare any Act of Congress unconstitutional. None of these attempts were successful.

A much-discussed proposal would provide that Congress, by a two-thirds' majority, could reverse any judicial decision holding an Act of Congress unconstitutional. It is argued that Congress is more sensitive to public opinion, while the Justices of the Supreme Court are apt to interpret the Constitution as a lawyers' contract.

The obvious objection to this plan is that it would tend to destroy the system of checks and balances between legislature and judiciary. Congress, it is argued, would be influenced by the immediate whims of the people, and might interpret the Constitution to please a passing popular fancy.

One of the greatest objections to previous decisions of the Supreme Court has been the divided opinions of the Justices. When a question of the validity of a statute providing that no labourer shall work in a bakery over ten hours in one day is presented to the Supreme Court, and five Justices say that the provisions of the statute are in conflict with the Constitution and four Justices dissent, it is only natural that the people should begin to believe, "We are under a Constitution, but the Constitution is what the Justices say it is."

Suggestions have been made that either a two-thirds' majority or a unanimous opinion be required to declare Acts of Congress unconstitutional in order to eliminate the five-four decision. At present it is doubtful whether any of these suggestions will prove acceptable to the American people. Judicial supremacy, with its apparent defects, is the will of the people.

The Supreme Court's right to declare acts of Congress which are contrary to the constitution, void, was first stated under the peculiar circumstances of the Case of *Marbury v. Madison*.

1. Constitution of the United States art. III, Section

2. 1 Cranch 137

THE INCORPORATION OF JUDICIAL
REVIEW IN THE AMERICAN SYSTEM.

The records of the American constitutional convention make it clear that either a legislative or executive negative, patterned after the colonial prerogative of the English Crown by which the King had power to negative colonial laws conflicting with the laws or policy of Great Britain, ~~were~~ not acceptable at that time. The question of a judicial negative was raised quietly and died out before serious debate on the subject could take place.

The written constitution states:

"The judicial power of the United States shall be vested in one supreme Court ... the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. ..."¹

The Supreme Court's right to declare acts of congress which are contrary to the constitution, void, was first stated under the peculiar circumstances of the Case of Marbury v. Madison.²

1. Constitution of the United States Art III, Sections 1, 2.

2. 1 Cranch 137.

The first two Presidents of the United States had been members of the Federalist Party. Chief Justice Marshall was also a member of that Party. Before John Adams, Second President of the United States, had completed his term, he had appointed William Marbury Justice of the Peace in the District of Columbia. The appointment had been confirmed, but had not been delivered. When Jefferson, a member of the Anti-Federalist party became third president of the United States, he ordered James Madison, his Secretary of State, to refuse delivery of the commission to the appointee of the out-going President. The disappointed office seeker sought from the Supreme Court a writ of Mandamus to Secretary Madison. Here was a real constitutional crisis. Could the Supreme Court, composed of members of one political party, dictate to the Supreme Executive of the United States, who was the member of another political party?

The immediate question before the Court was, has the applicant a right to the commission he demands? The Court answered affirmatively.

The question then asked was, if he has the right, and the right has been violated, do the laws of his country afford him a remedy? The Court answered that a remedy is afforded by the laws.

The third question was, is he entitled to the remedy/

remedy for which he applies? It is at this point that Marbury began to lose his case, and Chief Justice Marshall began to declare the power of judicial review of congressional acts. Marbury sought his remedy under the Judiciary Act of 1789 which authorized the Supreme Court to issue writs of mandamus to any Courts appointed or persons holding office under the authority of the United States. The Court held that such a power was not within the original jurisdiction of the Supreme Court as defined by the Constitution. Therefore the Judiciary Act of 1789, which had been passed by Congress as a legislative act, was repugnant to the Constitution of the United States. The last question raised was, can a jurisdiction conferred by Congress, not warranted by the Constitution, be exercised? May an act repugnant to the Constitution become the law of the land? The answer was in the negative.

The Court stated that the American Government was one of limited powers. Legislative powers are defined by the written constitution. If an act of Congress is on the same level with the written constitution, "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." The written constitution must therefore be considered as fundamental law, and acts of Congress are laws inferior to the fundamental law of the land.

Thus/

Thus a Federalist Court gave the decision to an Anti-Federalist President, but in doing so, established the right of the Supreme Court to pass on the validity of congressional acts.

Chief Justice Marshall, in delivering the opinion, gives no precedents for the theory of judicial review. Bonham's Case is not mentioned. Blackstone and Mansfield are mentioned, not on the point of judicial review, but in connection with the definition of Mandamus.

In rendering the decision great emphasis is placed on the necessity of the written constitution being regarded as fundamental law.

The answer cannot be given without investigating the fundamental law concept in the civil law as well as the common law. A comprehensive study of these systems would require volumes, and thus an effort will be made here to limit the study to evidence which bears to some extent on the American concept of fundamental law.

(1) Federalist Papers, No. 11. See my article in 100 Books and Ideas, December 4, 1934, p. 440.

(2) 1 Cranch 137 (1803).

(3) See Mullett, Fundamental Law and the American Constitution, p. 11, n.1.

The Fundamental Law.

In 1788, Alexander Hamilton wrote:

A constitution is in fact,
and must be regarded by judges
as fundamental law. (1)

Chief Justice Marshall declared in the case of Marbury v. Madison that the constitution was superior law, and that acts of Congress were inferior. (2) Congressional acts in conflict with the constitution are void. Did this theory originate with the founders of the American constitutional system? If not, from whence did it come?

The answer cannot be given without investigating the fundamental law concept in the Civil Law as well as the Common Law. A comprehensive study of these systems would require volumes, and thus an effort will be made here to limit the study to evidence which bears to some extent on the American concept of fundamental law. (3)

(1) Federalist Papers, lxxviii. See my article in the Scots Law Times, December 4, 1937, p. 249.

(2) 1 Cranch 137 (1803).

(3) See Mullett, Fundamental Law and the American Revolution, p. 13, n.1.

The investigation follows two channels of thought; in the first place, a study of the concept of fundamental law held by political theorists, and in the second place, a study of the references to fundamental law made by the North American colonists in their tracts, books, and speeches.

It should be noted in passing that periods of political and legal stress are not conducive to the development of careful judicial thought. In Seventeenth Century England, the conflict with the King over the use of the Royal Prerogative brought forth a new interpretation of the Magna Carta. It was used to support the arguments of Coke, Hampden, and Pym. In obscure passages of the famous document were found precedents for the arguments of these men. So too, in the period of the American Revolution, many of the appeals to fundamental law can be recognized as attempted justifications for those who opposed certain acts of Parliament. Actual knowledge of the leading writers on the subject of fundamental law was confined to a few Americans.

(1) Aristotle was frequently cited in the footnotes of pamphlets but there is no evidence to indicate that all those who cited him had actually read his works...Cicero had an extensive usage...Scarcity of writers is...apparent with regard to Mediaeval writers...although it should be remembered that ideas of these earlier writers filtered into colonial America through more popular channels. See Mullett, Fundamental Law and the American Revolution, pages 31-32.

Various Forms of the Fundamental Law; the Laws
of Nature, of God, and of Reason

Little attention is paid at the present time to the law of nature, but if we turn back to the pages of history to the last half of the eighteenth century, we discover that the American colonists were studying and expounding the law of nature, the law of reason, and the law of God. Certain acts which had been passed by Parliament at Westminster caused the colonists to protest that these acts were null and void, because they were contrary to nature, reason and God.

James Otis became the expounder of the American position in his protest against the Writs of Assistance. The three points on which Otis based his protest were:

- (1) That there is a natural right, sacred beyond the power of any government.
- (2) That which is vaguely called the British Constitution limits Parliament with respect to natural right.
- (3) That an Act of Parliament contrary to the Constitution is null and void. (1)

(1) See McElroy, in Hearnshaw, Social and Political Ideas of the Revolutionary Era, p. 17.

Otis was an advocate, not a philosopher. There can be found little that is novel in his contentions. He was using as proof, the philosophical and political theory of writers of past centuries. Yet the contention of Otis gave definite expression to the attitude of a large group of colonists.

The leaders of the American Revolutionary movement were men of diverse professions and occupations; doctors, lawyers, clergymen, tradesmen, and farmers.⁽¹⁾ They came from different parts of Great Britain, and it was only natural that there should be a variance of opinion. Yet many were agreed on one point, that a law contrary to fundamental law is void. The law of nature, the law of reason, the law of God, all formed a part of that vague concept, the fundamental law.

(1) For example, Mr. D. P. Heatley, in his essay on "An American Independence Group", which may be found in his book, Studies in British History and Politics Chapter 11, cites from Edinburgh University alone,

- (1) John Fothergill, Doctor of Medicine (who said the British Parliament has the power to do things which it has not right to do).
- (2) James Wilson, Lawyer and later Associate Justice of the U. S. Supreme Court (who argued that obedience was due the Crown, but not the British Parliament.).
- (3) John Witherspoon, Clergyman (who said from the pulpit that the cause of the colonists was the cause of justice, liberty, and human nature).

It may appear pedantic to define the law of nature, the law of reason, and the law of God, when describing the use of fundamental law concepts during the American Revolutionary period. It is reasonable to assume that most of the arguments advanced at that time were based on expediency rather than on theory. The pamphleteers used fundamental law concepts for the purposes of revolutionary propaganda, and had little regard for nice distinctions and careful definitions. The law of nature represented the will of the colonists, and the laws contrary to the law of nature, of reason, and of God, were certain acts of Parliament. (2)

Yet for the purposes of this thesis, the ideas of political theorists must be considered as well as the opinions of practical politicians, in order that an estimate may be made of the service which the theorist rendered to the colonists. Definitions of various forms of fundamental law may be found in the writings of legal scholars. Professor Holland describes the law of nature as "that portion of morality which supplies the more important and universal rules which are for the governance of the outward acts of mankind." (1)

(1) Holland, Jurisprudence (12th Ed.) p. 31.

Pollock defines ius naturale as "the rules of conduct deducible by reason from the general conditions of human society." (1) He enlarges upon this statement by giving an account of the etymological development of the words, and an historical account of the concept. Indeed, as Professor Bryce states, "it would be impossible, within the compass of anything less than a substantial volume, either to present a philosophical analysis of the ideas comprised or implied in the term law of nature, or to set forth and explain the various senses in which that term has in fact been employed, and the influence which, in those various senses, it has exerted upon political theory and upon positive law." (2)

Thus the explanation of the various senses in which the term natural law has been employed, and the influence which it has exerted upon political theory and positive law, will be limited here to the subject of this thesis, the British background of the American theory of judicial supremacy.

(1) Pollock, Essays in the Law, p. 35.

(2) Bryce, Studies in History and Jurisprudence, (1901) Volume ii, p. 112.

In general, the natural law concept may be said to have assumed two forms; firstly, elemental and fundamental rules of the Universe, and secondly, "principles of right, principles which are established or should be established if justice is to prevail." (1)

The utility value of an appeal to natural law can be recognized immediately. It can be employed in the attempt to seek relief against arbitrary power; to protect the individual against bodily harm, to preserve and secure his property. It can be employed in the effort to secure political freedom, to bring about social reform.

Aristotle drew a distinction between written law, and what he called "the common law," which is in accordance with nature and immutable. (2)

According to the Stoics, justice is revealed by nature, and not by the imposition of human beings. (3)

Cicero claimed that law, the highest reason, is implanted by nature. He also pointed out that it is natural for us to love mankind, and that this is the basis of law. (4)

(1) Wright, American Interpretations of Natural Law, p. 3.

(2) Aristotle, Rhetoric, i, 16. Cited by Holland, p.33.

(3) Holland, *ibid*.

(4) *Ibid*.

CICERO AND JUDICIAL REVIEW.

Professor H. A. Corwin states that Cicero made contributions, either directly or indirectly, to the theory of judicial review.

Claims have been made that Cicero made contributions to the American theory of judicial review. While this thesis is concerned with British contributions to the American theory, the writer has considered in the briefest possible manner, the evidence which might indicate that Cicero made, either directly or indirectly, contributions to the theory.

The writer has obtained his information from a book by Dr. Giovanni Ferris, De Formis et Modis Juris, The National Library of Florence has in addition dated 1567. (Particulars, Italy, II, page 187, records the customary form of writing claims.

De Formis et Modis Juris,
The National Library of Florence,
The National Library of Florence.

The following is a transcript,
and so is not liable to error.
1867, written by the author.
by H. A. Corwin.

Cicero.

Professor E. S. Corwin states that Cicero made
(1)
contributions, either directly or indirectly, to the
theory of judicial review:

Certain Roman procedural forms connected with the enactment of law suggested to Cicero, in answering this question, something strikingly like judicial review. It was a Roman practice to incorporate in statutes a saving clause to the effect that it was no purpose of the enactment to abrogate what was sacrosanct or jus. (2)

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- (1) Corwin, "The Higher Law Background of American Constitutional Law" 42 Harvard Law Rev.
- (2) Professor Corwin gathers his information from a 1754 edition of Barnabae Brissonii, De Formulis et Sollemnibus Populi Romani Verbis. The National Library of Scotland has an edition dated 1583. (Parisiis). Liber II, page 153, records the customary form of saving clause,

Si quid sacri sanctique est,
quod ius non sit rogari, ejus
hac lege nihil rogatur.

(If something is sacrosanct, such as is not lawful to propose, nothing thereof is proposed by this law.)

On another occasion, however, Cicero argued against the extension of such a saving clause to a certain treaty, that nothing can be Sancrosanctum nisi quod populus plebesve sanxisset, whereas the treaty in question had been made by the Senate. (1) Cicero suffered himself from a use of the clause by his enemy, Clodius, who endeavoured to render the law exiling Cicero irrepealable. (2)

(1) Pro Balbo.

(2) See Cicero's Oration, cap. 13 to cap. 16.

It was Cicero's contention that the enactment which banished him was no law. It is true that it had been abrogated, yet Cicero furnished several reasons why he believed it to be a nullity. The most interesting to mention here is Cicero's claim that as it had been passed upon the rogation of Clodius as tribune, the rogation was a nullity, as the "pseudo-plebeian was incompetent to be a tribune. For additional references, see Ersch and Grueber, Cicero 197, cf. 196, cited in Coxe, Judicial Power and Unconstitutional Legislation. p. 110.

De Formulis et Sollemnibus Populi Romani Verbis

records some interesting variants of the customary form of the saving clause. For example, an enactment of Sulla is cited: "Si quid ius non esset rogari, eius ea lege nihilum rogatum." (Whatever it is unlawful to propose, nothing of that nature has been proposed by the aforegoing law.) Again, from Pro Dom^o Sua, "Ut si quid ius non esset rogari, ne esset rogatum." (Whatever it is unlawful to propose, let it not be proposed.)

Alexander Hamilton possessed some knowledge of the Roman conception of higher law. In his notes for his argument in the case of Rutgers v. Waddington, (1) Hamilton wrote: "And here the rule of Cicero, De. In. L. 4, No. 145,"

Primus igitur oportet contendere comparando utra lex ad maiores hoc est ad utiliones ad honestiones ac magis necessarios res pertineat, ex quo confisitur ut si leges duae aut si plures aut quot quot erunt conservari non possunt qua discreperunt inter se ea maxime conservanda sunt quae maximus res pertinere videatur. (2)

(1) Mayor's Court, New York City, 1784.

(2) Evidently Hamilton wrote from memory, as the above quotation is full of errors. Hamilton's reference is wrong, states A. M. Hamilton, Hamilton, page 462. However, A. M. Hamilton is mistaken, for Alex. Hamilton refers to the old paragraph notation. It can now be found in De. Inventionem, ii, 49.

Although the case commenced and ended in the Mayor's Court of New York, it was considered of great importance, for it appeared that a conflict between a recent state statute and a treaty of peace signed by federal authority might develop. In case the court decided there was a conflict, it would be forced to decide whether state or nation should give way to the other. The court made every effort to avoid such a decision, and held that if the statute were properly interpreted, there would be no conflict between the statute and the law of nations, hence no conflict between the statute and the treaty of peace contracted by the central government. (1)

Hamilton's citation, according to Mueller's De Inventiones, is as follows: (2)

Firstly therefore, comparison of laws should be made by reflection as to which law deals with matters of the greater importance--that is, of greater practical, of greater moral, of more essential importance. From this the result is that, if there be two or more laws, or however many there may be, they cannot be preserved, inasmuch as they differ from each other: but let that law be considered especially worth preserving which deals with the most important matters. (2)

(1) See Alexander Hamilton's letter, American State Papers, i, p. 232.

(2) Mueller's text is in Latin. An English translation is submitted here.

It is important to note that Hamilton was familiar with certain passages of Cicero, and especially those passages which referred to a higher law, because Hamilton stated in the Federalist ⁽¹⁾ that the Constitution must be regarded as higher law. However, the reference to the passage from Cicero does not prove that Hamilton was influenced by Roman law concepts to formulate his theory of judicial review, for (1) Hamilton was acting as an attorney for the defence when he cited the example from Cicero, and was not expounding his theories regarding the American judicial system, and (2) the case came to trial in 1784, three years before the adoption of the American constitution. Since Hamilton's chief argument for judicial review was developed from the idea that judges must act as guardians of the written constitution, ⁽²⁾ it seems reasonable to conclude that the influence of the writings of Cicero on Alexander Hamilton's theory of judicial review, was fragmentary and indirect.

It would be extremely difficult, if not impossible, to prove that Cicero made any direct contribution to the establishment of judicial review, although attempts

(1) Federalist Papers lxxviii.

(2) Ibid.

(1)

have been made by several writers. They furnish evidence which tends to prove that the ideas of Cicero were used to justify the establishment of judicial review, but when attempts are made to use the same evidence for the purpose of proving that judicial review was established as a result, the case is unconvincing. In many instances, it is obvious that Roman law maxims may be selected for the justification of a theory which is different from the idea which the writer of the maxim had when he wrote it.

Two ideas traced to Cicero are of sufficient importance to mention here:

(1) His assertion that natural law needs no other interpreter than the individual himself. "Necque est quaerendus explanator, aut interpret eius alius." ("And we need not look outside ourselves for the interpreter of it" that is, the Lex Vera). (2)

(2) His description of the magistrate as being "law speaking". "Magistratum legem esse loquentem, legem autem mutum magistratum." (The magistrate is a speaking law and the law a silent magistrate.) (3)

(1) C. F. Mullett, Brinton Coxe, E. S. Corwin.

(2) De Rep. 3, 22.

(3) Cic., Leg., 3, I, 2.

Ideas similar to these were repeated by leaders in Great Britain and the United States.

Bacon speaks of rules which are indicative of the law. Human rules do not establish the law. They are like the needle of the sailors which indicates the poles. "Regula enim legem (ut acus nautica polos) indicat, non statuit." (1)

In Calvin's Case, Coke stated that the judges do not have the power to judge according to that which they think fit, but according to that which they know to be right and consonant to law. "Let the good judge do nothing on his own initiative, or by the intent of private desire, but let him rather make his decisions adhering to the law and its enactments." Iudex bonus nihil ex arbitrio suo faciat nec proposito domesticae voluntatis, sed iuxta leges iura pronuntiet. (2)

Burke stated that all human laws "are properly speaking only declaratory. They may alter the mode and application, but have no power over the substance of original justice." He argues that it would be hard to point out any error more subversive than the belief that human laws can derive any authority whatever from their institution. (3)

(1) Bacon, De Iustitia Universali, Aph. lxxxv.

(2) Coke, Calvin's Case, 4 Coke I (1609).

(3) Burke, "Tract on the Popery Laws", 6 Works, 322-3. (1867 ed.)

James Otis said, "The supreme power in a state is jus dicere only, and not jus dare; jus dare, strictly speaking, belongs only to God." (1) However, Otis is undoubtedly indebted to Bacon, for this idea, rather than Cicero, for Bacon wrote, "Judges ought to remember, that their office is jus dicere, and not jus dare; to interpret law, and not to make law, or give law." (2)

The idea persisted in the judicial decisions of the United States courts. For example, in the case of Osborn v. Bank of the United States, "Judicial Power as contradistinguished from the power of laws, has no existence." (3)

The idea has been repeated by a recent Supreme Executive of the United States. Calvin Coolidge said:

Men do not make laws (4)
They do but discover them.

Thus we see how the idea has persisted that there are certain fundamental principles of right and justice, which humans can discover and declare, but which are not of human creation. (5)

(1) Otis, Rights of the British Colonies, etc. p. 70

(2) Bacon, "Of Judicature" Essays, p. 158. (1894 ed.)

(3) 9 Wheaton, 738, 866. (U.S. 1824)

(4) Coolidge, "Have Faith in Massachusetts", p. 4. (1919)

(5) See Pollock, Essays in the Law, Chapter II; Bryce, Studies in History and Jurisprudence, ii, Chapt. XI

St. Thomas Aquinas explains that Divine Law is needed because "the final end of man is beyond human reason, because of the uncertainty of men's judgments, because human law can only deal with the external actions of men, and because human law cannot punish or prohibit all evil actions, lest it should do more harm than good." (1)

St. Thomas has no difficulty in recognizing both natural law and Divine Law. The natural law is more important than human law, for it is fundamental. "The Divine Law does not contradict nor annul the natural law, but it was added that men might participate in the eternal law in a higher manner." (2)

It is doubtful whether the early Puritans of New England would understand the explanations of St. Thomas regarding Divine Law. To them, Divine Law was the word of God revealed in the Scriptures. It was a practical explanation. They had little time for speculative thought. In an environment of undeveloped land, a vast wilderness where man had to battle against the elements and the ravages of the Indians, there was little opportunity to develop finely spun theory. Thus there is a sharp contrast between the

(1) Carlyle, Mediaeval Political Theory in the West
v, p. 40

(2) Ibid.

conception of the mediaeval scholars who lived in
universities and monasteries, and ^{that of} the Puritan settlers
in America.

It would be a mistake to claim that the early settlers in America were not influenced at all by such writers as St. Thomas Aquinas, Isidore of Seville, William of Occam^{*} and John of Salisbury. One might suggest that the writings of these men were not found to any great extent in colonial libraries; yet it is possible that the ideas of these men were transmitted to the colonists through secondary sources. To claim that the influence of these men was not felt in New England would indicate that the colonists knew little about mediaeval theology. This is quite reasonable, for even the few who claimed to be scholars were first of all Puritans. One concept shared by American Puritans and mediaeval saints was the belief in a fundamental law; eternal, immutable regulations for the Universe. Is this belief common to all mankind, or did the Puritans receive it as a part of their intellectual heritage?

Such writers as Bryce and Pollock^{state} Isidore of Seville and John of Salisbury made definite contributions to the natural law concept. (1) The ideas of these men, as well as the ideas of William of Occam, will be considered.

(1) Pollock, Essays in the Law, p. 40.

* Perhaps more commonly spelled Ockham.

THE CONCEPT OF FUNDAMENTAL LAW DURING THE MID-
DLE AGES

Isidorus of Seville.

During the Middle Ages the concepts of Roman Jurists were recorded by the priests and scholars of the Church. The law of nature was identified very often with the law of God. Questions of political and legal importance were discussed in the writings of many canonists, such as Isidorus of Seville, William of Occam (Ockham), and John of Salisbury.

Both Bryce and Pollock mention Isidorus, or St. Isidore of Seville, as a distinguished writer on natural law. (1) Isidorus lived in the seventh century, and some of his writings were given wide circulation because portions were incorporated in the first part of the Decretum of Gratian.

Isidorus divides law into two classes, Divine and human. The nature of Divine law corresponds to human laws, but human laws differ in that they vary according to the nation in which they are promulgated. Divine laws are eternal, and like the laws of nature, (2) are immutable.

(1) Pollock, Essays in the law, p. 40 . Bryce, Studies in History and Jurisprudence, vol. ii, p. 157.

(2) "Omnes autem leges aut divinae sunt aut humanae. Divinae naturae humanae moribus constant, ideoque hae discrepant, quoniam aliae aliis gentibus placent. Fas lex divina est: ius lex humana. Transire per agrum alienum fas est, ius non est." Isidorus, Operum, Tom I.

Isidorus explains that the human race is ruled by two things--namely, natural law and character. His idea of natural law is influenced by his religious views. He states that natural law is contained in the Gospel, and his explanation makes it apparent that he is referring to certain passages found in the sermon on the mount. The individual is bidden to do to another as he wishes done to himself, and forbidden to do harm to another which he would not wish done to himself.

(1)

The Decretum is important because it is the first organized system of canon law on record.

"Natural law," says Gratian, "is Divine law, and all laws which are contrary to this are null and void."

(2)

Thus we find an expression (which follows the thought of St. Thomas Aquinas and earlier writers) in the Decretum which is similar to that used by the Justices of the Supreme Court of the United States when a congressional act is in conflict with the Constitution of the United States. The concept of "higher", or "fundamental" law was known before the common law was an organized system and before the British Constitution had been developed.

Footnotes (1) and (2) for the preceding page.

(1) " Humanum genus duobus regitur, naturali vide-^{licet}
iure et moribus Ius naturale est quod in lege
et evangelio continentur quo quisque iubetur
aliis facere quod sibi vult fieri et prohibetur
aliis inferre, quod sibi nolit fieri. Unde
Christus in Evangelio. "Omnia quaecumque vultis
ut faciant vobis homines et vos eadem facite
illis. Haec est enim lex et prophetarum."

(2) Carlyle, Mediaeval Political Theory in the West,
 (1928) vol. v., page 460.

William of Occam.

A departure from the conventional threefold classification of law, namely, ius naturale, or the rules or instincts common to all animals, ius gentium, or the rules common to all mankind, and ius civile, or the particular laws of this or that commonwealth, is noticeable in the writings of William of Occam. He divided ius naturale into three possible categories:

- (1) Universal rules of conduct dictated by natural reason.
- (2) Rules which would be accepted as reasonable, and therefore binding, in a society governed (or in any society so far as governed) by natural equity without any positive law or custom of human ordinance.
- (3) Rules which may be justified by deduction or analogy from the general precepts of the law of nature, but not being in fundamentals, are liable to modification by positive authority. (1)

(1) See Pollock, Essays in the Law, page 38, where reference is made to Dia., pars.III, tr. ii, l. 3. c. 6, page 932 in Monarchia Tom. II.

The ideas of this brilliant Englishman were conditioned, undoubtedly, by his disputes and controversies over both political and ecclesiastical matters, with the Emperor, the Pope, and the University authorities. One idea expressed by William in a discourse on the standards of right and wrong clearly indicates his independent thinking, and is interesting to note here because of its similarity to a question which was raised in Bonham's Case.

What is the standard by which what is right is to be distinguished from what is wrong? The ecclesiastic finds it in the decrees of the Fathers, and in the statutes and ordinances of the Popes, but the soldier, in reply, shows the injustice of making one of the parties in the dispute the arbiter in the debate.(1)

Thus William of Occam uses this illustration to indicate that a man ^{can} not be both judge and party to the same dispute.
(2)

(1) Private Pamphlet, A. 171, Reference Room, Carnegie Library, Edinburgh.

(2) 8 Coke 114a, ff.

John of Salisbury.

The famous author of Policraticus, John of Salisbury, who lived in the twelfth century and served as Bishop of Chartres, attempted to write a systematic treatise on Politics.

From Cicero to Isidorus on through Gratian's Decretum a concept was transmitted which may be found in the Policraticus.

There are certain precepts of the law which have perpetual necessity, having force of law among all nations, which absolutely cannot be broken. (1)

John of Salisbury made his contribution in the line of mediaeval writers to the concept of a government of laws and not of men, through his distinction between a prince and a tyrant. The tyrant is one who oppresses the people by rulership based upon force, while the prince is one who rules in accordance with laws. It is unlawful for him to have a will apart from that which law or equity enjoins, or from what the common interest requires. (2)

(1) Dickinson, The Statesman's Book of John of Salisbury, p. 33. Cited in 42 Harvard Law Rev. p.164

(2) Carlyle, Mediaeval Political Theory in the West, vol. v. pages 460-461.

John of Salisbury also gave expression to an important mediaeval political theory, a distinct contribution of the middle ages to modern political thought, that government on earth is intrinsically limited. Political authority is not absolute, because it is limited by the principles of divine reason and moral order. Human law is either the expression of these, or it deals with subjects compatible to divine reason and moral order. Any human law in conflict with these is a bad, unjust law. It becomes, then, the test of a legitimate or illegitimate government, and the test of whether the ruler is a true prince or a tyrant.

"The law is supreme because it is just, and so far as it is just, and all other authority is subject to the law. This is the foundation of the rule of law."⁽¹⁾

This contribution of the middle ages, the rule of law, found expression in the writings of another Englishman, and was definitely established as a political concept. The other Englishman was not an ecclesiastic nor was he a philosopher. He was a practical jurist. His name was Bracton, or Henry of Bratton.

(1) Carlyle, Mediaeval Political Theory in the West, volume v. p. 460.

Bracton.

Bracton, or Henry of Bratton, was a judge in the reign of Henry III, and it is believed that he wrote the second general treatise on the common law, the first having been written by Glanvil. Tottel, in 1569, published Henrici de Bracton de Legibus et Consuetudinibus Angliae.
(1)

Bracton was expounding English law, yet his exposition of it, written in Latin, was in form like Justinian's Institutes. Maitland has declared that Bracton was a disciple of the glossators, and perhaps had studied in the Roman school, at Bologna.
(2)

Bracton revealed that English law had its foundations in writs and cases decided in the courts. Law embraced customs, decisions of prudent men, and rules made by King in Council. The Magna Carta was designated by him as Carta Libertatum.
(3)

(1) Beale, Bibliography, p. 150, cited in Levy-Ullmann The English Legal Tradition, p. 134.

(2) Maitland, "Select Passages from the Works of Bracton and Azo" Selden Society Publications viii.

(3) Holdsworth, History of the English Law, ii, p. 243
It is explained that Glanvil is primarily a book on procedure, and Bracton, although little concerned with the law of nature, reveals more Roman law influence.

The period in which Bracton lived was one of uncertainty regarding the relationship of the King to the common law. The victory won through the Magna Carta caused new questions to develop which were of the utmost importance in the development of constitutional law. (1)

There were two possibilities, to take the view of Roman authorities, that the common law was the King's law, or to follow Teutonic traditions, with modifications caused by the Great Charter, and ^{to} consider law as a rule of conduct independent of the King. (2)

While Bracton argued that the King was supreme in his own realm, he contended that the royal power should be subject to the law, and that law should be passed by the consent of the magnates "after due deliberation and discussion." (3)

It was fitting that the King should respect law, which would repay the debt which the King owes to law, which gives him his rights. As Professor Maitland points out, (4) this is a change from the earlier period. In the reign of Henry II,

(1) Holdsworth, History of English Law, ii, pp. 252-290, also Maitland, Bracton's Note Book, Introd. pp. 1-8.

(2) Holdsworth, ibid.

(3) Holdsworth, ibid. "Quicquid de consilio et consensu magnatum et republicae communi sponsione, auctoritate regis sive principis praecedente, iuste fuerit definitum et approbatum."

(4) Maitland, Bracton's Note Book, Introd. pp. 1-8.

when Glanvil wrote de legibus Angliae, the King's will was law. Bracton stated (and he was undoubtedly propounding theory rather than describing the practice) that there existed not only the power of the King, but the law which made him King.

This let the King obey,
so doing, he loses no
whit of majesty or power,
becomes subject to none
but himself. Our Blessed
Lady, even our Blessed
Lord, were thus obedient
to the law for man. (1)

Holdsworth points out that there is a passage in Fleta which indicates that the Barons are the King's masters, who must restrain him if he breaks the law. (2)
Yet the question remained unsettled until the seventeenth century, says Figgis, because until that time, (3)
the problem of sovereignty had not become clear. (4)
Then the writings of Bracton were important in effecting " a reconciliation between the dogma of the personal superiority of the King to the law, and the dogma that the royal prerogative is subject to the law."

Bracton's writings were used by Fitzherbert when he composed his Graunde Abridgement, which, in turn, was one of the sources of information for Coke.

(1) Quoted by Maitland, Bracton's Note Book, i, p. 3.

(2) Holdsworth, History of the English Law, i, p. 255.

(3) Figgis, Divine Right of Kings, pp. 32-33.

(4) Holdsworth, History of English Law, ii, p. 255.

Holdsworth points out that Coke relied on Bracton and Fitzherbert when he resisted the new courts and councils which threatened the supremacy of the common law courts. The issue of the contest would have been more doubtful had not Coke been able to draw on Bracton. Coke was able to use Bracton as an authority in his attempt to liberalize the law, and Bracton was used as an authority by leaders when they endeavoured to argue that the royal prerogative was subject to law. ⁽¹⁾ The Ship Money Case (1637) and the Trial of Charles I are cited as specific examples.

It is reported that Coke used Bracton's words, quod Rex non debet esse sub homine, sed sub Deo et lege in reply to James I when he told Coke that it would be treason to affirm that he would be under law. ⁽²⁾ Thus Bracton's influence became strong again, after loss of prestige in the fourteenth and fifteenth centuries, and in 1765, the American colonist James Otis, cited Bracton as an authority on the law of nature, probably because Coke, whose statements were quoted again and again by the colonists, had cited Bracton as an authority in his disputes with James I. ⁽³⁾

(1) Holdsworth, History of English Law, ii, pp288-289.

(2) Holdsworth, ibid, v, p. 430

(3) Quincy's Reports, page 202 and following. Mullett, page 34, states Drayton and Arthur Lee also cited Bracton.

(3)
The Mirror of Justices.

Mention will be made here of the book which (1)
Winfield describes as almost a "practical joke".
The book is believed to have been written by one
Horne or Horn, a fishmonger, between 1285 and 1290.
The book was of little importance in its own age,
but in the sixteenth century, when lawyers were
eagerly searching for precedents to support their
views, the Mirror of Justices came into favor, and
in the words of Maitland, Coke "devoured its con-
tents with uncritical voracity." (2)

Through the writings of Coke the Mirror of
Justices was given wide circulation, and much that
was faulty passed into English decisions through
Coke's citations. (3)

It is stated in the Mirror of Justices that
although the King should have no peer in the land,
yet if he should sin, writs and complaints done by him
should be tried in the parliaments, since neither

(1) Winfield, Chief Sources of English Legal History
page 266.

(2) Selden Society Publications, Vol. vii, p. ix.

(3) Winfield, page 267.

(1) Selden Society, Vol. vii, p. 7.

(2) Maitland, History of English Law, Vol. ii.

(3) Selden Society, Vol. vii.

King nor his commissioners could judge, as the King
 would be a party to the case. ⁽²⁾ This is noted here
 because of the question raised by Coke in Bohham's
Case (8 Coke 118a) whether a man could be both
 judge and party to the same case.

Holdsworth speaks of the author of the Mirror
of Justices constructing his ideal system of law
 out of his head, assisted by the Bible. ⁽²⁾

Horn stated that law was nothing more than the
 rules laid down by the Scriptures. It is called
 the common law because it has been given to all in
 common by God himself. For specific definitions,
 the author claimed one could turn to the ordinances
 of Alfred, and ^{to} the forty articles of the Magna Carta.
 They were the fundamental rules of the realm, and
 all acts contrary to this fundamental law were said
 to be void. ⁽³⁾

In conclusion, it may be said that the Mirror
of Justices was taken seriously at a time when men
 were falling back upon the appeal to fundamental law.
 Although it must be admitted that the book was full
 of foolish statements, it nevertheless helped to
 serve as background for the American Colonists when
 they opposed acts of Parliament as contrary to funda-
 mental law.

(1) Selden Society, Vol. vii, p. 7.

(2) Holdsworth, History of English Law, Vol. ii, p. 330.

(3) Selden Society, Vol. vii, pp. 8 et seq., 175-200.

The Writings of Sir John Fortescue.

The fifteenth century produced an English Chief Justice whose writings were familiar to the colonial lawyers of America. ⁽¹⁾ De Natura Legis Naturae was written between 1461 and 1464, while Fortescue was in Scotland. ⁽²⁾ It was written in support of the Lancastrian claims to the Throne, and Fortescue uses the law of nature to justify his position in making his statements. De Laudibus Legum Angliae, which has been characterized as a treatise about the law rather than a law treatise, ⁽³⁾ was written while Fortescue was in France, and contains instruction to the young Prince concerning the law. The relation of the King to the law is described:

A King of England cannot at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political. ⁽⁴⁾

(1) "Chief Justice Fortescue occupied no inconsiderable space in the political education of colonial lawyers." Mullett, page 37.

(2) Winfield, Chief Sources of English Legal History page 315

(3) Ibid. (4) De Laudibus Legum Angliae (Amos Ed.) page 26.

Law consists of "customs, statutes or acts of Parliament, and the law of nature."⁽¹⁾ In connection with the law of nature, Fortescue states that the laws of England are neither better nor worse than those of other states, as far as they are deduced from or as far as they agree with the laws of nature, for, quoting the "philosopher" in the fifth chapter of his Ethics, "the law of nature is the same and has the same force all over the world." Fortescue is more concerned with the proper education of his Prince; he is desirous of acquainting him with the laws of England, rather than in giving any detailed account of the law of nature, yet his declaration that the King cannot change nor alter the laws without the consent of his subjects, nor burthen them against their will, in order that the people might enjoy their property without worry of being deprived of it by the King or others, implies that the royal power itself is subject to a higher law.

Fortescue points out that the Prince himself need not act as a judge. "Such matters may be left to your judges." (2)

(1) Fortescue, De Laudibus Legum Angliae (Amos Ed.) p. 20.

(2) Proprio ore nullus regem Angliae iudicium proferre usus est. Amos Ed. p. 23, n. b.

This was almost a century and a half before the time that Lord Coke faced James I and spoke regarding the administration of justice by the courts rather than by the King.

Other portions of De Laudibus Legum Angliae reveal attitudes towards the common law which proved important in later years. In particular, it is of some importance to notice the reference to human laws as "rules whereby the perfect notion of justice can be determined." Arguing that happiness is the summum bonum, he points out that the Peripatetics placed it in virtue, the Stoics in honesty, the Epicureans in pleasure, and Aristotle, in the exercise of all virtues.

This being granted, I desire you to consider what will follow from these premises. Human laws are no other than rules whereby the perfect notion of justice can be determined, but that justice, which those laws discover, is not the commutative, or distributive kind, or any one distinct virtue, but it is virtue absolute and perfect, and distinguished by the name of Legal Justice. (1)

The influence of Fortescue's words can be found in Coke, Blackstone, and other writers who frequently cited De Laudibus Legum Angliae.

(1) Fortescue, De Laudibus Legum Angliae, (Amos) p. 11



It should be noted here that Fortescue identifies human rules, or positive laws, with perfect justice. It would appear to some that this is merely an example of Fortescue's enthusiasm for the common law. Corwin thinks this statement to be singularly significant. (1) He indicates this as an example of the way in which common law, or parts of the common law, became the higher, or fundamental law. These fundamental laws were incorporated in the Constitution of the United States. (2) It has been previously noted that during the middle ages, Divine Law and Natural Law were identified with justice, and human laws were of less importance. If the Ius Civile were contrary to the Ius Naturale, justice could not prevail unless the Ius Naturale were followed. Fortescue, in his enthusiastic praise of the common law, writes much more about the good qualities of the law than he does about the law itself. It is necessary to have due regard for his purpose in writing the book. He was writing for the instruction of the Prince, and was not acting in his capacity as a judge.

(1) 42 Harvard Law Review, pp 170, 180

(2) Ibid, note 66. "Many of the rights which the Constitution of the United States protects at this moment against legislative power, were protected by the common law against one's neighbors."

Fortescue's praise for the common law, and his conception of the law as a "professional mystery," a peculiar science of Bench and Bar, must have exerted an influence on later judges (Coke in particular) ⁽¹⁾ to consider the judges as the only competent ⁽²⁾ authorities concerning the common law.

(1) Coke states:

True it was, that God Had endowed His Majesty with excellent science...but His Majesty was not learned in the laws of His realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial judgment and reason of the law, which law is an act which requires long study and experience, before man can attain to the cognizance of it, and that the law was a golden met wand and measure to try the causes of His subjects, and which protected His Majesty in safety and in peace.

(Prohibitions del Roy, 7 Coke 63-65, 1609 Ed)

(2) Professor E. S. Corwin, who has attacked the theory of Judicial Supremacy as it exists in the United States, eagerly siezes the opportunity to make the most of Fortescue's praise of the common law. Corwin staes:

But the distinctive contribution of De Laudibus has still to be mentioned, that feature of it which discriminates it sharply from all earlier eulogies of higher law. This is Fortescue's conception of the law as a professional mystery, as the peculiar science of the Bench and Bar.

Corwin, "The Higher Law Background of American Constitutional Law" 42 Harvard Law Review, 180.

In the Amos Edition (1825) of De Laudibus Legum Angliae, there is an extensive note at the conclusion of chapter sixteen regarding the law of nature. The question is raised whether there are any dictates of nature apart from the question of utility, and it is pointed out that even the philosopher cannot find an easy solution to the problem. It is indicated that the friends of the institutions of Great Britain will be careful when such a vague standard as natural right enters into any question capable of being determined by positive law. It is then pointed out that much uncertainty and perplexity has existed amongst legal authorities concerning this question.

Mention is made here of this note because it would indicate that De Laudibus Legum Angliae, even as late as 1825, had aroused interest in the natural law. Another point to note is the doubt thrown upon the claim that there exists any uniform dictates of nature independent of the consideration of utility. In 1825 the utility value of the colonists' reliance upon the law of nature must have been clearly apparent.

Amos concludes:

Examples abound in the history of this country, in which the injunctions of the law of nature have been pleaded as a sanction for the most flagrant violations of civil rights. (Amos Ed. n. a, pp48-49.

Doctor and Student.

It is reported that Thomas Jefferson was so impressed with St. Germain's Doctor and Student (1) that he planned to annotate it thoroughly. It was the philosophical approach to law which held the interest of Jefferson.

The book was well known to English lawyers in the latter half of the sixteenth century. (2) Coke and Fitzherbert make reference frequently to this book.

Developed in the form of a dialogue between a student of the laws of England and a doctor of divinity, the book explains how laws were influenced by the ideas of the times.

(1) Mullett, Fundamental Law and the American Revolution, p. 39.

(2) Winfield, Chief Sources of English Legal History, states:

Doctor and Student was well known and well liked in the legal profession. Great men like Fitzherbert and Coke cited it frequently, and there is reason to think that it partially filled a gap which only Blackstone's Commentaries were destined to close.

(Winfield, p. 323.)

A Doctor of Divinity, that was of great acquaintance and familiarity with a student in the laws of England, said unto him,

" I have had a great desire of a long time to know whereupon the law of England is grounded; But because the law of England is written in the French tongue, therefore I cannot through my own study attain the knowledge thereof, for in that tongue I am nothing expert. And because I have found thee a faithful friend to me in all my business, therefore I am bold to come to thee before any other, to know thy mind, what be the very grounds of the Law of England, as thou thinkest." (1)

The student consents, but asks the Doctor to explain other laws which are cognate to English law. The Doctor classifies the other laws as (1) Eternal Law, (2) The Law of Nature of Reasonable Creatures, or The Law of Reason, (3) The Law of God, (4) The Law of Man.

After the Doctor of Divinity has explained his division of other laws, he asks the student regarding the law of nature in England.

(1) Doctor and Student, (1721 edition) p. 1.

The student replies that when "anything is grounded upon the law of nature" ⁽¹⁾ it is said that reason wills that such and such be done. There are two kinds of laws under the classification of reason. Murder, perjury, deceit, and burglary are prohibited by reason primarily. An example of what would be void according to the law of reason is given: "Any promise made by man as to the body, it is by the law of reason void in the laws of England." ⁽²⁾

The law of a secondary reason is grounded on the general law or the general custom of property. Thus there is little in the student's explanation of the Law of Nature of Reasonable Creatures which could be identified with the conventional concept of the law of nature. When the student gives an example of the Law of God, however, one notes a similarity to the traditional explanation of fundamental law concepts.

St. Germain states:

"If it were ordained that no alms should be given for no necessity, the custom and statute were void." ⁽³⁾ However, he points out that a law which would prohibit alms to a beggar

(1) St. Germain, Doctor and Student (1721 Ed.) p. 15.

(2) Ibid.

(3) Ibid, p. 18.

who could work is not void, "for it observeth the intent of the Law of God." (1)

Vinogradoff cites St. Germain as one who had a stimulating influence on English Jurisprudence of the fifteenth and sixteenth centuries, although he stresses the point that many of the ideas in Doctor and Student were taken from the works of John Gerson. (2)

Potter mentions the influence of Doctor and Student on the Chancellors, who derived many of their ideas from legal philosophers and canonists. (3) The Chancellors were influenced by the theory that the law of God governed the Universe. A law made by man could not be valid if it were in conflict with a law of God. Potter states:

In the Doctor and Student these two propositions are clearly stated. "When the law eternal or the will of God is known to His creatures reasonable by the light of natural understanding, or by the light of natural reason that is called the law of reason: and when it is showed of heavenly revelation... then it is called the law of God." (4)

(1) St. Germain, Doctor and Student (1721) pp.18-19.

(2) Vinogradoff, "Reason and Conscience in Sixteenth Century Jurisprudence", 24 Law Quarterly Rev. 373 ff

(3) , (4) Potter, Historical Introduction to English Law and Its Institutions, pp.494-495.

St. Germain continues:

...If any law made of men bind any person to anything that is against the said laws (the law of reason or the law of God) it is no law but a corruption and a manifest error. (1)

Thus:

Consequently the Chancellor arrogated himself the right to interfere with the course of law in a particular instance, even where the general rule was just, if according to the conscience it would work against the law of God. (2)

In conclusion one may state that the discussion concerning the Law of God, and the general philosophical approach to the explanation of English law, exerted an influence upon the lawyers and judges of England and through them was transmitted to the colonists in America.⁽³⁾

(1) Cited by Holdsworth, History of English Law, 3rd Ed. Vol. iv, p. 280, nn. (1), (2). Also by Potter, An Historical Introduction to English Law and Its Institutions, pp. 494-495.

(2) Potter, p. 495.

(3) Mullett, Fundamental Law and the American Revolution, pp. 38-41, 43, 63, 78.

It must be noted, however, that the author of Doctor and Student made it clear that "the term law of nature is not used among them that be learned in the law of England." (1) Not until the turn of the century--the beginning of the seventeenth, did the law of nature, or the law of reason, find itself definitely and boldly set forth in English case law. Thus we find in Calvin's Case (7 Coke I, 4b,1610):

- (1) That ligeance or obedience of the subject to the Sovereign is due by the law of nature.
- (2) That this law of nature is part of the laws of England.
- (3) That the law of nature was before any judicial or municipal law in the world.
- (4) The law of nature is immutable and cannot be changed.

Coke argues that the law of nature was infused in the heart of man at the time of the creation, "written by the finger of God in the heart of man" until Moses, the first law reporter, recorded it. Coke mentions Aristotle, Bracton, Fortescue, and cites Doctor and Student, cap. 2 and 4.

It is now time to consider Coke's dictum in Bonham's Case. The case has been cited in the United States as a British precedent for judicial review.

(1) St. Germain, Doctor and Student (Muchall ed.1787) pp. 12-13.

1. BONHAM'S CASE.

Bonham's case did not receive as much attention at the time the decision was rendered as it did when Americans discovered statements of Lord Coke which were similar to the ideas held by the Colonists immediately before the American Revolution. The case is of little interest to the people of Great Britain to-day, who know that the Supremacy of Parliament has been recognized since 1688.

What was the statement which the Colonists quoted as an authority for their stand against the Stamp Act?¹

And it appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such an act to be void.²

What caused Coke to make this statement, and what are his authorities?

It will be noted in the case that the Statute 10 Henry VIII provided that the Royal College of Physicians were granted power to fine practitioners who were not admitted by them, and that one-half of the fine was to go/

1. See John Adams, Works 9: 390, 391, note, and Appendix, Quincy, 527.

2. 8 Coke 114a (C. P 1610).

go to the King and one-half to the college. This means that the Royal College of Physicians were both judges and parties to the case, according to Coke, who states,

The Censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have moiety of the forfeiture, quia aliquis non debet esse Judex in propria causa imo iniquam est aliquem suae rei esse judicem; and one cannot be judge and attorney for any of the parties. ¹

One of the cases which Coke cites to sustain the contention that a man cannot be a judge in his own case contains the following,

(Y.B. 8 Henry VI, at page 20.)

Rolf: I will tell you a fable. Once upon a time there was a Pope who had created a great offense and the Cardinals came to him and said, "Peccasti," and he said, "Judica me." And they said, "Non possumus quia caput es ecclesiae; judica teipsum." And the Pope said "Judico me cremari," and he was burnt. And in this case he was his own judge, and afterwards he was a Saint. So it is not inconvenient for a man to be his own judge.²

In the Case of the Earl of Arundel against Lord Windsor and Another, 3 Edw. VI 65, (Dyer's Reports, Vol. I), another authority cited by Coke, it was decided that one cannot be both a judge and an attorney for/

1. Thomas and Fraser Edition (1826), Coke's Reports, 8 Coke 114a, ff.

2. Rolf was counsel for the Chancellor of Oxford. The question before the Court was whether a charter of Richard II gave the chancellor jurisdiction in cases where he was himself a party. See 10 Eng. Historical Rev. p. 536.

for any of the parties. This, without a doubt, is an authority for his statement. However, if one turns to Rolle's Abridgment, volume II, pages 92 and 93, one finds, written in old legal French, fourteen exceptions to this maxim.

In Quincy's Mass Reports, 525, Dr. Bonham's Case is cited by Otis in the Writs of Assistance. The question of whether a man can be judge in his own case is considered in an elaborate footnote. Numerous examples are given to show that a man may be both judge and interested party.

Now let us consider Bonham's Case in some detail: There are two Reports:

(1) Coke (8 Coke 114a (C.P. 1610)

Coke presided at the trial as Chief Justice of Common Pleas.)

(2) Brownlow (2 Brownl. 255 (C. P. 1610)

Brownlow was present at the latter stages of the case in his capacity of Prothonotary of the Court.)

Brownlow reports earlier proceedings than Coke, while the latter naturally preserves his own judgment at greater length. Taken together, the two sources enable us to reconstruct the argument in the case with considerable detail and fair certainty, although, as we shall see later, the accuracy of Coke's reports have been attacked. (This is a reference to the attack attributed to Lord Ellesmere.) ¹

1. 40 Harvard Law Review, p. 31.

A DIGEST OF BONHAM'S CASE.¹

Dr. Bonham claimed £300 damages for false imprisonment by the President and Royal Censors of the Royal College of Physicians and Surgeons. The defendants entered a plea of not guilty, and issue thereon as to force and arms. As to the residuum of the trespass they plead in bar.

The defendants set out the letters patent of Henry VIII, who commanded that among other things, a certain College of Physicians should have the overseeing, searching, and correction of the Physicians who practiced in the City of London, and said College of Physicians had the right and power to punish any physician who was not properly practising his profession in the City of London. It was provided that the President and College should be authorized to "search, examine, correct, and punish all transgressors, and should send, for disobedience, or contrary to any article or clause contained in the grant, to any prison ... except the tower of London."²

The plaintiff, contrary to the letters patent, had not been admitted by the President and College, because he had been examined and found insufficient to practise physics. He was forbidden to do so, yet he continued/

1. 8 Coke 114a.

2. 8 Coke 114a.

continued to practice. Bonham was then fined 100 shillings, and was enjoined from practising physic in London. The plaintiff continued to practise his profession. He was then advised to make his appearance, before the Censors, but he did not do this. He was then amerced ten pounds and was ordered to be arrested and delivered into custody. The Plaintiff appeared before the president and censors, and refused to yield obedience. Bonham stated that he had practised and would continue to practise without leave of the College. He denied that the College had any authority over him, because he was a graduate of the University of Cambridge, and had taken the degree of Doctor of Physic.

The censors ordered Dr. Bonham to prison, and the order was executed. In the case for false imprisonment, the Court held for the plaintiff, because:

- (1) The censors had not the power to commit the plaintiff for any of the causes mentioned in the bar. The college did not possess the powers they claimed over unlicensed (as distinct from incompetent) practitioners.
- (2) Even if they did they had not pursued their powers aright.

To support the first point, five reasons were given. It is the fourth reason which has been quoted as an authority for the American theory of Judicial Review.

COKE'S AUTHORITIES.

"The Censors cannot be judges, ministers, and parties: judges to give sentence or judgment; ministers to make summons, and parties to have the moiety of the forfeiture." ¹

for Coke's contention received criticism almost immediately, in "Brinton's Observations." Mr. Brinton Coke makes no comments on the case, but Professor Blackstone attacks the case in the following account in his book, Interpretation of statutes in the 14th Century:

Tregor's Case. (Y. B. Pasch. 3 Edw. III, 25.)

Coke misquoted the Year Book.

Harris saith some statutes are made against law and right which those who made them perceiving, would not put them into execution.

The italicized words are interpolations by Coke which do not appear in the original, and introduce an idea of some superior right which Harris certainly did not entertain. The only example which Harris's words can reasonably be taken to bear is that sometimes the legislator has repented of a faulty piece of work and has been content to allow it to become a dead letter. Secondly, whoever reads the whole of Harris's remarks can see that he did not regard the statute then under discussion as falling within this category; on the contrary he suggested a perfectly obvious and straightforward interpretation of it, in which Hilary concurred. It cannot be denied that Coke's first authority is far from convincing.

My conclusions concerning Professor Blackstone's assertion will be considered later.

1. Thomas and Frazer (1876) Ed. 8 Coke 118a.

COKE'S AUTHORITIES.

Coke's first precedent is Tregor's Case. As will be shown later, the use of this case as an authority for Coke's contention received criticism almost immediately, in "Egerton's Observations." Mr. Brinton Coxe makes no comments on the case, but Professor Plucknett attacks the case in the following account in his book, Interpretation of Statutes in the 14th Century:

Tregor's Case. (Y. B. Pasch. 8 Edw. III, 26.)

Coke misquoted the Year Book.

Herle saith some statutes are made against law and right which those who made them perceiving, would not put them into execution.

The italicized words are interpolations by Coke which do not appear in the original, and introduce an idea of some superior right which Herle certainly did not entertain. The only meaning which Herle's words can reasonably be made to bear is that sometimes the legislator has repented of a hasty piece of work and has been content to allow it to become a dead letter. Secondly, whoever reads the whole of Herle's remarks can see that he did not regard the statute then under discussion as falling within this category; on the contrary he suggested a perfectly obvious and straightforward interpretation of it, in which Hilary concurred. It cannot be denied that Coke's first authority is far from convincing.

My conclusions concerning Professor Plucknett's assertion will be considered later.

Coke's/

Coke's second authority is Fitzherbert, Cessavit

42. Professor Plucknett states,

In the Graunde Abridgement of Fitzherbert it occupies but two lines, and they are not altogether intelligible, but in Coke's telling the story gains an aunt and a niece as well as considerable clarity--all derived from an unspecified and an unidentified source. However, even in the form in which it appears in Fitzherbert, it is plain that the judgment was in complete accordance with that in the earlier case, Copper vs. Gedderings Y. B. 3 Edw. II 105 which is more fully reported and for our knowledge of which we are indebted to the Year Books of the Selden Society.

The facts of the case are these:

Statute of Westminster 2nd enacted that the right of action in Cessavit should descent from a lord to his heir; but when an heir brought his writ, Chief Justice Bereford refused to maintain it on the ground that if it were maintained, certain general principles of the common law would be disturbed.

It has been claimed that Bereford often embodied his distinctly original views upon legal problems in his judgments, "but in this case the same decision was given half a century later in the case of Cessavit 42 quoted by Coke, and duly enshrined in the books of authority as the final law upon the subject."¹

Natura/

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1. See 40 Harvard Law Review, p.36. "Here then is no mere caprice of one particular judge but a catena of authorities extending down to Coke's own day."

69.

Natura Brevium (1553) CLVIID,

Fitzherbert, Natura Brevium (Hale's Ed. 1755) 209; 2 Co. Inst. 402, 460.

The statement of Sir Frederick Pollock (Pollock, First Book of Juris, 3rd ed. 1911, 264) "that no case is known, in fact, in which an English Court of Justice has openly taken on itself to overrule or disregard the plain meaning of an act of Parliament," is thus open to objection. Here the statute was disregarded.¹

However, it must be pointed out that this is not necessarily a precedent in constitutional law. The decision does not definitely declare that judges have the power to declare a statute null and void in certain instances. It would appear that Coke has claimed too much for the case.

Coke's third precedent is found in Fitzherbert, Annuities 41. A good translation of Annuities 41 should be accredited to Miss Klingsmith in 1 Statham (1915) 114, where it appears as Annuities 11. It is to be noted that she has translated "impertinent" by "impossible." This follows the traditional view.

One Rous brought a writ of annuity against an abbot and showed a deed for the annuity made by the predecessor of this same abbot and sealed with the/

1. See 40 Harvard Law Review, p.36.

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the seal of the Convent, which annuity was for certain bread, and ale, and robes and other things, etc.

Pole: The Statute of Carlisle says that Cistercienses and Premonstratensians and others who have a convent and a common seal, that the common seal shall be in the keeping of the prior, who is under the abbot etc. and four others, the wisest of the house, and that any deed sealed with the common seal which is not thus in their keeping shall be void. And we say that at the time this deed was sealed, the seal was out of their keeping. And the opinion of the Court was that the Statute was void since it is ^(impertinent) impossible to be observed, for when the seal was in their keeping the abbot could not seal anything with it for when it was in the hands of the abbot it would be out of their keeping, ipso facto. And if the statute shall be observed every common seal will be defeated by a simple allegation which cannot be tried, etc. See E the case for it was well debated and many exceptions were taken to the place, etc. (Note: Must see manuscript, for no printed Paschal for 27 Henry VI.)

Professor Plucknett points out several discouraging features of the case as a precedent: (1) Only an opinion of the judges is rendered; judgment is not reported and may never have taken place; (2) The word void is not used of the statute; (3) We have no access to/

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to documents earlier than forty years after the event, and all of the arguments have been lost; (4) Mr Brinton Coxe's conjecture that the decision was influenced by consideration of canon law (although Professor Plucknett minimizes the importance of this argument).

Professor Plucknett does emphasize the importance of the word "impertinent," as contrasted with impossible, found in Coke (2 Coke Inst. 587-88) and Blackstone (1 Blackstone Commen. 91).

Thus the case is of some strength, but not altogether convincing as a precedent for Coke's contention.

In 118 B, Coke cites 14 Eliz. Dyer 313, and Strowd's Case. The cases developed out of a situation which arose out of the upsetting of legal titles of religious houses at the time of the Reformation.

The report of the 1572 case is as follows:

"Memorandum, that it was resolved by the opinion of the Court on the Bench, that the Seignory and tenure of obit land, or Chantry land, is extinct by the possession of the King, by the act of 1 E. 6 (C. 14) notwithstanding the saving in the act; propter absurditatem."¹

Thus to impossibility and impertinence is added absurdity. The solution is explained by Professor Plucknett as one where

the court refuses to recognize the express words of the Statute in favor of rent services; but what it takes away with one hand, it prudently restores with the other, for it concedes/

1. 3 Dyer, 313 (K. B. 1572)

concedes that the quondam lord - we may no longer call him lord after the king's seisin - may still exact his rent by way of distress. ¹

Last of all, Coke states, in Strowd's Case, this imaginary situation:

So if any act of Parliament gives to any to hold, or to have cognisance of all manner of pleas arising before him within his manor of D, yet he shall hold no plea, to which he himself is party, for, ²as hath been said, iniquum est aliquem suae rei esse judicem.

Beginning with the idea that letters patent could not make a man judge in his own case, thus an act of Parliament would be just as ineffective. ³

1. Plucknett, 40 Harvard Law Review, 43.

2. 8 Coke 118 B.

3. Corwin, in The Doctrine of Judicial Review (1914), p. 69, accepts the Manor of Dale case as a real precedent!

LORD CHANCELLOR EGERTON'S OBSERVATIONS ON LORD COKE'S
REPORTS AND CRITICISMS OF LORD EGERTON'S OBSERVATIONS

1. The criticism of Bonham's case by Lord Egerton
(British Museum Library 694 m 4)
 - A. Comparison of Coke's statement with that of
Herle (8 Edw. III, 30)
2. Sergeant Hill's Observation on the stricture of
Lord Egerton (Inscribed in Hill's handwriting,
in the copy of the report in
Lincoln's Inn Library, London.
The statement of Hill is printed
in a footnote, volume 4, Coke's
Reports, page 376 (Thomas Frazer
Edition, 1826.)
3. Holdsworth's comments on Lord Egerton's Observa-
tions (5 Holdsworth, Hist. Eng. Law 478, n.1)
 - A. 36 Law Quarterly Review 4
4. Plucknett's comments on Lord Egerton's Observations
(40 Harvard Law Review at page 52)
 - A. Moore, 828, K. B. 1616
 - B. 36 Law Quarterly Review, pages 5, 6.
Note by Sir Frederick Pollock, reviewing
a case Bourne v. Keane (1919) A. C. 815

1. For an account, see Pakenham, Fourteenth English
Law, p. 1.

What Reception was Accorded the
Doctrine by Coke's Contemporaries?

The criticism of Bonham's Case by Lord Egerton

In the library of the British Museum may be found an interesting document, which, it is reported, was written by the Chancellor Lord Egerton, criticizing Coke for his "extravagant" opinions.

Coke's rapid rise from the Chief Justiceship of the Common Pleas to the King's Bench and his ambition to be recognized as the "Chief Justice of England" brought opposition from several sources, and it was not long before he found himself fighting the Court of Chancery, and even offending the King. In 1616 he was directed by the King to correct his reports, and while this matter was pending he was removed from his office as Chief Justice of the King's Bench. His removal will not be discussed here. We are concerned with the charges against his reports, which were prepared by Francis Bacon, and approved by the then Chancellor, Lord Ellesmere (Egerton).¹ It was charged that Coke actually went out of his way to state opinions which were "extravagant" and also ^{to advance} opinions that were not essential to the decisions in the cases.

1. For an account, see Birkenhead, Fourteen English Judges, p. 8.

Five cases were cited: (1) The Case of Isle of Ely (10 Coke), (2) Darcy's Case (11 Coke), (3) Godfrey's Case (11 Coke), (4) Bonham's Case (8 Coke), (5) Bagge's Case (11 Coke).¹ A portion of Lord Egerton's Observations is directed to Bonham's Case. Coke is criticized for placing his opinion above that of the Three Estates--The King, The Lords, and the Commons. The claim is to frustrate the labour of the Estates, "which degradeth much the wisdom and power of Parliament."

The following statements are taken directly from the copy in the British Museum Library:

Lord Chancellor Egerton's Observations on Lord Coke's Reports

--Touching the Power and Jurisdiction of Courts and Commissioners

. . . which are established by the Common Law, by Continual Life and Practice within the realm, or by Act of Parliament, it is a point of great danger, and breedeth occasion of much contempt in the inferior subjects, when they see the same either questioned, impeached, or weakened, and therefore, as it is fit, that each stream should keep his own current, yet is it as unfit in an unsettled state, that the current should be stopped or made straighter, than by continual life it hath been. Yet the Chief Justice, in his reports, hath scattered many sudden opinions in Diminution of the lawful power of many courts, not only in abridging, but in a manner wholly upsetting the jurisdiction of some of them, to give instances of a few:

1. A summary of these cases may be found in Boudin, Government by Judiciary, I, 492-494.

- (1) Godfrey's Case. C O L 1 1 F 4 4.
- (2) Dr. Bonham's Case. COL8F118.

The case in question being, what power the College of Physicians had by their charter, and by the Act of Parliament, 14H8 to imprison any other physician that practiced in London, without the License of the College, he letteth fall, not at unawares but de industria this paradox, that in many cases, the Common Law shall control Acts of Parliament, and sometimes shall adjudge them to be utterly void; for, saith he, when an Act of Parliament is against Common Right and Reason the Common Law shall control it, and adjudge it to be void, which degradeth much from the wisdom and Power of the Parliament; that when the three estates, the King, the Lords, and the Commons, have spent their labour in making a law, then shall three judges on the bench destroy and frustrate all their pains, because the Act agreeth not (in their particular sense) with Common Right and Reason; whereby he advanceth the reason of a particular Court above the judgment of all the realm. Besides, more temperately did that Reverend Chief Justice Herle, in the time of Edw. III deliver his opinion, 8 Edw. III 30, cited by my Lord Coke, when he said, some Acts of Parliament are made against Law and Right which they that made them, perceiving, would not put them in execution; for it is *Magis Congruum*, that Acts of Parliament should be corrected by the same pen that drew them, than to be dashed to pieces by the opinion of a few judges.

The Observations considered only one precedent listed by Coke; an investigation of some of the others would have strengthened the criticisms. Evidently Bacon and Egerton did not check original sources, for recent studies of the Year Books have brought to light even more temperate words than those which the Observations point out. Plucknett claims that Coke¹ added the words but this would mean either (1) Bacon

1. 40 Harvard Law Review, 35 ff.

and Egerton used Coke's Reports as a basis for their distinction between the words of Herle and Coke, or (2) that other reporters of Tregor's Case had added the words "law and right," and Coke, using this reporter's account of the case, cannot be held responsible for the additional words.

It is important to note, however, that soon after the publication of Coke's report of Bonham's Case, there was objection raised both to the decision and to at least one of the authorities he cited. One wonders whether Egerton's distinction is not sufficient to destroy the effectiveness of Tregor's Case as an authority, without accusing Coke of making additions to Herle's statements, as Plucknett has done.

In the Thomas and Frazer edition of Coke's Reports, the editors devote a considerable amount of footnote space to the Observations of Lord Egerton and the comments of Sergeant Hill. Winfield, in the Chief Sources of English Legal History, mentions Hill as the editor who produced the fifth and best edition of Burrow's Reports (1756-1772). Hill's edition was printed in 1812. He was undoubtedly one of the respected editors of the time, and editors Frazer and Thomas, who published their edition of Coke's Reports in 1826, considered Hill's comments on the Egerton Observations of great footnote value.

It will be noticed in the following account of Hill's comments, that Hill definitely comes to the defense of Coke. Furthermore, Hill reports that in Forbes' Parliamentary Debates, volume VII, pages 84, 85, one may find several examples of Parliamentary Acts that have been declared void. A thorough search was made through the files of the British Museum Library, and no trace could be found of Forbes' Debates. Whether this was a mistake of Sergeant Hill, or a mistake of the editors, or a mistake of the British Museum Index, has not yet been determined. If there were such a volume, it could be found in the British Museum Library, according to the head librarian. It is possible that the author's name was confused with the printer's. At the present time, the library staff of the British Museum are trying to locate the volume to which Hill refers.

In the Thomas and Frazer edition (1826) of Coke's Reports the following quotation is given from Lord Ellesmere's Observations on the Reports, page 21.

And as for novelty in Dr. Bonham's Case, the chief justice having no precedent for him, yet doth he strike in sunder the bars of government of the College of Physicians and without any pausing on the matter, frustrate the patent of King Henry VIII, whereby the college was erected, and tramples upon the act of Parliament, 14 and 15 Henry VIII whereby the patent was confirmed, blowing them both away as vain, and of no value, and this in triumph of himself, being accompanied but with the opinion of one judge only for the matter where three other judges were against him, which case possesseth a better room in the press than is deserved.

Appended to this portion of the Observations
is found:

Sergeant Hill's Observation on Stricture
of Lord Ellesmere (Egerton)

(Inscribed in Hill's handwriting. Copy Lincoln's
Inn Library) Footnote--Thomas Frazer (1826) Vol. 4.
Coke Rep. P376.

In page 117 of the Report of Dr. Bonham's Case, 8 co. it appears that two of the other judges agreed with Coke as to the two points of which they gave judgment. The 2nd point is in 117b, and the matter of law in support of it, which is condensed here, is in page 118, viz., that a statute against reason is void, and is supported by many authorities, then, and by others before, and since, in our courts; and the antiquity of it is still more ancient. Just. Inst. Lib. Title 2, Text 1. Dr. Bonham's Case is reported in 2 Brownl. 255 to 266, and in page 260, it appears that the case was argued by all the Justices of C. P. and at two several days it was argued by Foster, Daniel, and Warburton, are not reported by Brownlow; but he reports fully, 1st, the argument of Walmsley for the Plaintiff, and afterwards that of Coke against him, and in page 265, the like reasons and authorities are given by Coke, for his opinion as it appears in his reports; and then Brownlow mentions, only at the end, that so he (Coke) concluded that judgment shall be entered for the Plaintiff, which was done accordingly. This last report, I think, is a confirmation of Lord Coke's report; though Lord Coke only reports the effects of the arguments of the justices, who were of opinion against the Plaintiff, fol. 116. There is, it is true, in some parts of the argument, some things that savour of the pedantry and quaintness peculiar to the time, but nothing to impeach that part of it which is the part objected to by Lord Egerton, and, as observed, Coke's opinion as to that part at least, is confirmed by many authorities before Dr. Bonham's Case.

It is interesting to note that the copy of Egerton's Observations has been attacked not only because of

content, but by many legal historians who have doubted its authenticity. The following summary of attacks is offered:

1. There is considerable doubt whether Lord Egerton is the author. (See Holdsworth, History of English Law (1924), 478, n. 1 (1920) 36 Law Quarterly Rev. 4.)

2. In the preface, to the Observations, written by George Paul, considerable time is spent attempting to reassure others that the observations were written by Lord Egerton (as if it were necessary to reassure, indicating considerable doubt).

3. Also, there is added (by Mr. Paul)

For my part, I have but one scruple about it, and that rises from a particular expression in Dr. Bonham's Case, page 11, but, that, I believe, will appear a difficulty to a very few readers, and not be taken notice of by a great many.

Query: What expression?

4. Plucknett, in 40 H. L. R. at p. 52, points out that even Lord Egerton, in his address to Chief Justice Montagu, commending those judges who do not declare statutes void for being contrary to reason and common right, makes one exception: "I speak not of impossibilities or direct repugnances." (Moore, 828 (K. B. 1616)).

5. 36 Law Quarterly Review, pp. 5-6, note by Frederick Pollock, reviewing a case *Bourne v. Keane* (1919) A. C. 815 89 L. J, ch. 17, says:

A tract entitled the Lord Chancellor Egerton's Observations on the Lord Coke's Reports was cited in the argument, and is referred to in the judgments. Its attribution to Lord Ellesmere appears

to rest on very slender evidence. It was printed early in the 18th Century, as appears by typographic indications, with a preface by one George Paul (not learned in the law by his own statement, and not to be confused with Ellesmere's contemporary, Sir G. Paule, tracing it to the manuscripts of the late Mr. Laughton, of Cambridge, a person not discoverable in the D. N. B.). The heading on the first page describes the observations as taken out of his (Lord Ellesmere's) papers written with his own hand; this being, according to Mr. Paul, the very same title ... prefixed to them by Mr. Laughton. Now the tract is such a memorandum as the Secretary or officer of the Court might very well have prepared under Lord Ellesmere's direction, and Lord Ellesmere himself, conceivably, though not very probably, have copied from the subordinate draft--it might even be with amendments or added touches of his own. But it does not seem at all likely that he should have been at the pains of going through Coke's Reports himself to pick out passages for censure, Mr. Laughton's opinion (whoever he may have been) to the contrary notwithstanding.

6. Volume 5 Holdsworth, W. L., History of English Law, 234: "There is no warrant for ascribing to him (Egerton) the volume of Observations on Coke's Reports, which sometimes passes under his name."

BRITISH CASES AND TEXTS BEFORE AND AFTER BONHAM'S CASE
WHICH CONSIDERED SIMILAR ISSUES

1. Prior of Castle Acre v. Dean of St. Stephens
(21 Henry VII, pages 1-5)

This case involved the exercise of Spiritual Power by a Temporal Legislature. The case considered the question whether an act of Parliament could make the king, a temporal man, the parson of a certain church. This act would therefore give spiritual jurisdiction to a temporal man without the consent of the spiritual power.

2. Sheriff of Northumberland's Case
(Y. B. 2 Henry VII, page 6)

Although the Year Book reports records no decision in this case, it is reported in Calvin's Case (7 Coke 1a, 14a, C. P. 1608) that the judges did agree, and in Godden v. Hales (2 Shower 478) it is recorded that "the sheriff's case in the 2nd year of Henry 7th was law, and always was taken as law." It is recorded in Shower that the judges in the Sheriff's case held a statute invalid because it was judicially ascertained to deprive the king of a part of his rightful prerogative.

3. Day v. Savage (87 Hobart's Rep. 1614)

Asserted that an act of Parliament may be void, although the case did not turn on that point.

4. Mayor and Commonalty of London v. Wood
(12 Modern Reports, 669, 687)

This case involved a by-law of the City of London rather than an act of Parliament. Holt referred to Coke's doctrine and definitely supported it in his opinion.

5. Certain statements of Coke (2 Institutes 4) and of Blackstone (I Commentaries 91) regarding the construction and interpretation of acts of Parliament.

6. Opposition to the Coke Doctrine

Streater's Case (1653)

Parrish of Great Charte v. Parrish of Kennington
(1742)

1. Prior of Castle Acre v. Dean of St. Stephens

It is possible to find several cases which developed because a statute caused conflicts over jurisdiction or appeared to be opposed to some maxim, or fundamental law. Naturally before the reformation, there were several cases which developed over spiritual and temporal powers, and the conflict between the Common Law Courts and the Ecclesiastical Courts.

One of the cases often cited is that of Castle Acre v. Dean of St. Stephens. Here the question developed in the common law court regarding the validity of an act which would give spiritual jurisdiction to a temporal man without the consent of a spiritual power. The question is only of historical interest now, for the reformation gave Parliament power and control of ecclesiastical matters. However, in the time of Henry VIII, it was decided that an act of Parliament could not make the King, a temporal man, a parson of a certain church. We are indebted to Brinton Coxe for his translation and summary of the case:

The Prior of Castle Acre brought an action of annuity against the Dean of St. Stephens. In making his title, the plaintiff claimed that all his predecessors had been seized of the annuity by the hand of a certain A., Parson of the Church of N. and all his predecessors de temps dont memory ne court, and that

the annuity was in arrear. The defendant claimed that the parsonage was and had been appropriated to the Priors of B. devant temps de memory. Their priory was a cell of the Abbey of Caen in Normandy. In time of war King Edward III seized all lands which were temporalities of Alien Priors. This was the state of things until 2 Henry V, in which lands so seized by the King should remain in sa possession a luy et ses successors forever. Edward IV granted the parsonage to the Deans of St. Stephens, by letters patent, which were produced by the defendant, who claimed that it was thereby given as it existed in the king's hands and so discharged of the annuity.

One of the questions involved in the case was this: Whether or not the king could be made parson by the act of Parliament (si le Roy puit estre parson per l'acte de Parlement). If the king had been made Parson of the Church of N. by the Alien Priors act of 2 Henry V, the plaintiff could not recover, because the annuity was determined for reasons of prerogative. But if the king had not been parson, then no reason of prerogative existed for the determining of the annuity.

The following passages relating to the question whether the king had been parson or not, are translated from the report. The proceedings reported are those of two separate days. The case was considered at much length.

It was said by Palmes at the bar:

It seems that the king can not be called parson by the act of Parliament; for no temporal act can make it that temporal act can make temporal man have spiritual jurisdiction. For if it was ordained by act, etc., that such a one should not tender tithes to his curate, the act would be void (le Act' sera void), for concerning such thing as touches merely the spirituality, such temporal act can make no ordinance (tiel temporal 'acte ne puit faire ascun ordinance): the law is the same (meme la Ley) if it was enacted that one parson should have the tithes of another. So by this act which is merely one of a temporal court, the king can not be made to have any spiritual jurisdiction.

Coningsby, in argument on the other side, maintained that the king had divers benefices in Wales which are continually in his hand. Kingsmill, Justice, said: "The act of Parliament can not make the king to be parson: for we can not by our law make any temporal man to have spiritual jurisdiction, for no one can do this except the Supreme Head (of the Church)."

Fisher, Justice, said: "The king can not be parson by this act of Parliament, neither can any temporal man be called parson by this act."

On the other hand Vavasor, Justice, observed:

Whether the king can be parson or not: and it seems to me that he can. And as to this I shall first put to you several precedents. I know of divers lords who have parsonages in their own use and we gave their names and places, so that it is not impertinent (impertinent) that the king should be called parson; and especially by the act of Parliament. For in the time of king Richard II, there was division for the pope in time of vacation, as was afterward, and because it was certified to the king and his council, that certain priests in England had offended in divers points, they were deprived of their benefices by act of Parliament:

so you can see how spiritual things were taken by act of Parliament from them who were spiritual men. Those things were, indeed, mixed with the temporality: for if they were purely spiritual, perhaps it would be otherwise.

The proceedings were terminated by Chief

Justice Frowyke's opinion in which he said:

As to the other matter, whether the king can be parson by act of Parliament; as I understead, it is not a great matter to argue: for I have never seen that any temporal man can be parson without the agreement of the Supreme Head (of the Church). And in all those cases which have been put, namely, those of the benefices in Wales, and the benefices which laymen have in their own use, I have seen to the matter; the king had them by the assent and agreement of the Supreme Head (of the Church); and so a temporal act can not, without the assent of the Supreme Head (of the Church), make the king parson (issint un acte temporal sans le assente del Supreme Teste ne puit faire le Roy parson).

Although Mr. Brinton Coxe devotes several pages to the discussion of this case in his book, Judicial
Power and Unconstitutional Legislation¹ it is impossible to see how this case furnishes any direct precedent for the matter under discussion. True, the word "void" is used, in pointing out that the statute attempted to regulate a spiritual matter, but the case would seem to indicate that the statute could not operate in the ecclesiastical sphere, because the ecclesiastical sphere at that time was similar to a foreign jurisdiction. At best, the case can be considered as an analogy, rather than a precedent, for the American system of judicial review.

1. Chapter XIII.

2. The Sheriff of Northumberland's Case

The Sheriff of Northumberland's Case is of importance because it is quoted in Godden v. Hales and Calvin's Case. An examination of the Year Book report of the case reveals that the judges did not reach an agreement in the end,¹ while Coke in reporting Calvin's case indicates that the judges did agree. Shower's report of the case Godden v. Hales gives the following account:

Debt for five hundred pounds upon the statute of 25 Car. II. c.2, for accepting and exercising the office of colonel, etc., not having taken the oaths, and subscribed the declaration; and set forth an indictment, and conviction for the same, per quod actio accrevit.

The defendant pleads in bar, that after his admission, and before three months expired, the king, by his letters patent, had pardoned, released, and dispensed with said oaths. The plaintiff demurs.

Mr. Northey for the plaintiff..... The king can not control and act of Parliament that disables a man.....

Glanville, serjeant (for defendant)..... There is a great distinction between the laws of property and those of government.....

The opinion of the court is as follows: "The Lord Chief Justice took time to consider of it, and spake with the other judges, and three or four days after, declared that he and all the judges (except

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1. Y. B. 2 Henry VII, p. 6 ff: "Because this was the first time, the judges and Serjeants and attorneys of the King agreed that they should study well as to the matter, and they should be heard, and what they had said was for nothing, for they wished to be at their liberty to say what they wished and to think for nothing what they had now said."

Street and Powell who doubted) were of opinion, that the kings of England were absolute sovereigns; that the laws were the king's laws; that the king had a power to dispense with any of the laws of government as he saw necessity for it; that he was the sole judge of that necessity; that no act of Parliament could take away that power; that this was such a law; that the case of Sheriffs in the second year of Henry the Seventh, was law, and always taken as law; and that it was a much stronger case than this. And therefore gave judgment for the defendant."

It is to be noted that both the Castle Acre case and the Sheriff's case are concerned with things which are now a matter of history; in the Castle Acre case, the Ecclesiastical Court; in the Sheriff's case, the King's Prerogative--which it is true, was of foremost concern during Lord Coke's time, but which has been relatively unimportant since 1688. The cases are of value to prove that courts used the word "void" in connection with statutes, but the meaning of the word "void" here might well have been "inoperative."

During the days of the American Revolution, Otis spoke of "void" acts as being no acts at all, and thus of no effect. James Wilson also spoke of void acts in the same way. Without trying to develop an argument around refined distinctions, it might be suggested that they might well have used their arguments in connection with the two cases which have been discussed. The Act of a temporal Parliament was inoperative in Spiritual matters, just as it would be inoperative in another

jurisdiction; and again, in the Sheriff's case, an act would be inoperative in the realm of the King's powers. The argument, of course, falls when applied to the second case, because of the continual struggle between Parliament and the King for prerogative power, and as history well records, the struggle was most bitter when Lord Coke threw the support of his court against King James in the struggle for Royal Prerogative.

3. Day v. Savadge¹

In this case the City of London claimed that it possesses through an ancient privilege, possibly originating through royal patent, but confirmed by an act of Parliament in the reign of Richard the II, the right to vest in the Recorder the power to declare what were the Customs of the City. Day contended that this would make the City a judge in its own case. The words of Hobart follow: "Even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void Jura Naturae sunt immutabilis and they are leges legum."

Here Hobart does not expressly endorse Coke's theory, but he must have been a believer in the Coke Doctrine, for in Lord Sheffield v. Radcliffe, he states:

1. Hobart, 85 (K. B. 1614)

If you ask me then, what rule the judges guide themselves in this diverse exposition of the self same word and sentence? I answer, it was by that liberty and authority that judges have over laws, especially over statute laws, according to reason and best convenience to mold them to the truest and best use.¹

4. Mayor of London v. Wood²

This case is of interest because it came to the support of Coke and his statement in *Bonham's case*. The support which Holt gave to *Bonham's case* has been frequently quoted in American cases during Colonial times, as will be seen later.

This case was an action of debt brought before the court holden before the mayor and aldermen of London. The question arose whether the very man (the Lord Mayor) who, as the head of the city, presided over the court, was not also a party to the suit. The action was brought in the court in the name of the mayor and commonalty of London and it was held to be error.* Holt, C. J. said: "What my Lord Coke says in *Bonham's case*, in his 8 Co., is far from any extravagancy, for it is a very reasonable and true saying, that if an act of Parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one who lives under a government judge and party. An act of Parliament

1. Hobart, 334, 346 (K. B. 1615)
2. 12 Mod. 669 (Mayor's Court, 1701) 12 Mod. does not have a high rating as an example of law reporting. See Wallace, *Reporters* (4th Edition, 1882.) pp. 355-56, 389-90.

may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B.: but it may make the wife of A. to be the wife of B., and dissolve her marriage with A. **

* 12 Modern, 687 reports the case as the City of London v. Wood, but the opinion states that the plaintiffs were as above mentioned.

** On this case compare Bank of U. S. v. Deveaux, 5 Cranch, page 90.¹

It will be noted that the case was decided in 1701, after Parliament had been recognized as supreme. Lord Holt does not adopt the Coke doctrine, but mentions that it is "far from extravagancy" which of course is commenting on the Observations of Egerton and using the same expression negatively. Lord Holt indicates that an act of Parliament can do no wrong, although there are many things it can do which look pretty odd.²

5. Comments of Coke and Blackstone upon the Subject

In Coke's second Institute, he indicates that any statute contrary to the Magna Charta shall "be holden for none." At first glance it would seem that Coke regarded the Magna Charta much in the same way that Marshall regarded the Constitution. Yet further reading from the Second Institute would lead one to believe that Coke was referring to laws passed by the

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1. Coxe, Judicial Power and Unconstitutional Legislation, p. 173.
 2. In King v. Earl of Banbury, Skin. 517, 527 (K. B. 1695) Holt declared it to be the judges daily task to "construe and expound acts of Parliament, and adjudge them to be void." See 40 Harvard Law Rev., p. 55, n. 72.

Lords of the realm, or possibly decrees of the King, before the time of the Magna Charta.

In the Proeme of the Second Institute, Coke indicates that it is by Act of Parliament that the Magna Charta shall be taken as "higher law:"

A. Proeme--Page 4

And albeit judgments in the King's Courts are of High Regard in Law, and Indicia are accounted as Iuris Dicta, yet it is provided by Act of Parliament, that if any judgment be given contrary to any of the points of the Great Charter, or Charta de Foresta, by the Justices, or by any other of the King's Ministers, So, it shall be undone and holden for nought.

And that both the said charters shall be sent under the great seal of all Cathedral Churches throughout the realm, there to remain, and shall be read to the people twice every yeare.

The highest and most binding laws are the Statutes which are established by Parliament; and by authority of that High Court it is enacted (only to show their tender care of the Magna Charta and Charta de Foresta) that if any statute be made contrary to the Great Charter, or the Charter of the Forest, that shall be holden for none. By which words all former statutes made against either of those Charters are now repealed; and the nobles and great officers were to be sworn to the observation of Magna Charta, and Charta de Foresta.¹

Professor McKecknie makes the observation that the Magna Charta has been too often described in terms of inflated rhetoric, and he mentions that among others, Sir Edward Coke lost the faculty of critical and exact

1. Coke's 2nd Institute, 1642 edition, London. Printed by Miles Flesher and Robert Young, for and are sold by Ephriam Dawson, R. Meighen, William Lee, and Daniel Polkeman, in Fleet Street, 1642.

scholarship in describing the Magna Charta.¹

However, in this particular quotation, there should be no difficulty. Coke is merely indicating that Parliament has given its approval and support to the Spirit of the Magna Charta, and so firmly is it embedded in the minds of Englishmen, that all nobles and officers of the realm are sworn to observe its provisions.

As Professor Keith points out,² Coke states in his Fourth Institute, page 36, that the power of Parliament is so transcendent and absolute³ that it cannot be confined for persons or causes within bounds.

6. Opposition to the Coke Doctrine

Even before 1688, we find cases such as Streater's Case (1653).³ Here the Chief Justice even declined to let a counsel urge that an act of Parliament was bad because it was against the laws of the land.

Barrister: My Lord, every Return ought to have these two things in it, the cause and and how long he shall be prisoner; and so you have it in Magna Charta, p. 54. My Lord, all acts of Parliament against the laws of the land are in themselves void. The law is above Parliament.

Judge: Good Sir, do not stand to repeat these things before us.

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1. McKecknie: Magna Carta, p. 133
 2. Keith, The First British Empire, p. 349
 3. 5 State Trials, Charles II (1653), 372.

In the case of the Parish of Great Charte v. ¹
Parrish of Kennington it was held that if the only
competent judge, assigned by a statute, was interested
in the dispute, he nevertheless could proceed in the
dispute. It was conceded under ordinary circumstances
as a good principle that a man should not be a
judge and a party to the same dispute. The principle
of this case was affirmed in 1849 ² although counsel
urged such cases as Bonham's Case, City of London v.
Wood, and Day v. Savadge as precedents against such a
holding. This certainly destroyed the Coke theory as
a valuable precedent.

Blackstone's Rule Regarding Invalid Statutes

Lastly, acts of Parliament that are impossible to
be performed are of no validity: and if there
arise out of them collaterally any absurd conse-
quences, manifestly contradictory to common reason,
they are with regard to those collateral conse-
quences, void. I lay down the rule with these
restrictions; though I know it is generally laid
down more largely, that acts of Parliament con-
trary to reason are void.

This is the famous tenth rule of construction
of William Blackstone. However, the rule continues at
some length to explain that if the Parliament positively
enacts a law that is unreasonable, no authority can
control it, and he further indicates that the judges

1. 2 Strange, 1173 (K. B. 1742)
2. 12 Beav. 63, 77 (Rolls Court, 1849)

are not at liberty to reject it, because this would set the judiciary above the legislature and be subversive of all government. However, he points out, that where some collateral matter arises out of the general words, which happens to be unreasonable, there the judges might conclude that this was not foreseen by Parliament, and the judges are then at liberty to expound the statute by equity.

Too often the first part of the rule has been quoted--lifted out of its context and used to advantage in a particular case. It is clear that this rule is not as inclusive as the theory expounded in *Bonham's Case*. One does not know whether Parliament enacted the provisions for the licensing of physicians in London, well aware of the unreasonableness of the provision (an assumption in itself), but if this were true, the dictum in *Bonham's Case* is then limited to *Blackstone's* rule.

THE REVIEW OF LEGISLATIVE ACTS

DURING THE COLONIAL PERIOD

A. English Procedure in Administrative and Judicial Review of Colonial Acts

1. Administrative Review and Disallowance of Acts by the Privy Council (The case of Winthrop v. Lechmere Privy Council (1727), 4 Conn. Hist. Soc. Coll. 94 n.)
 - a. Through charters granted to the colonies, provisions were made that colonial laws, usages, or customs, which were repugnant to acts relating to the colonies, or were contrary to English Law were void.
 - b. Through Parliamentary Acts which stipulated limitations on laws passed in the colonies.

(1) "And it is further enacted and declared by the authority aforesaid, that all Lawes, by-Lawes, usages or customs at tyme or which hereafter shall in practice or endeavoured or pretended to bee in force or practice in any of the said plantations which are in any wise repugnant to the before mentioned Lawes or any of them or which are wayes repugnant to this present Act or to any other Law hereafter to bee made in this Kingdome soe far as such Law shall relate to and mention the said plantations, are illegal and void to all intents and purposes whatsoever." National Library of Scotland, From an Act Preventing Frauds, and regulating abuses in the Plantation Trade. Statutes of the Realm, 7:105 (1695-6).

- c. No systematic review of Colonial legislation provided until 1660, and then not complete.
 - d. After 1696, authority and procedure to place a check on undesirable acts were delegated primarily to the Board of Trade and to the Colonial Govenors.

(1) The exercise of administrative review over legislative acts and ideas, and principles were developed which in many respects prepared the way for the adoption of the doctrine of judicial review of legislative acts when the colonial governments were molded to suit the conditions of the American State.

e. In the case of the Royal Colonies, the English Government exercised a double check upon colonial laws. By instructions to the governors, undesirable measures might be vetoed, and by requiring that all acts might be transmitted to England, there was an opportunity for disallowance by the Privy Council.

(1) Referring Acts to England necessitated machinery to be set up in order to have an orderly review of all acts.

(a) Matters of a legal nature were referred to advisers of the crown to determine.

Note: Material for this outline was gathered from Haines, American Doctrine of Judicial Supremacy, Chapter III;
Labaree, Royal Government in America, pages 5 ff;
Thayer, Cases on Constitutional Law, I.

English Procedure in Administrative and Judicial Review of Colonial Acts

It will be noted that the English Judiciary had very little to do with the colonies. During the first part of colonial history, the colonies were recognized as dependencies of the Crown and not of Parliament. It was not until after parliamentary supremacy was firmly established that Parliament took an active part in the control of the colonies.¹

Appeals from the colonial bench, except in Admiralty cases, lay to the Privy Council and not to the courts at Westminster.²

An exposition and discussion of the case of Winthrop v. Lechmere will now be in order. This case has received the attention of almost every writer on the subject of precedents for the American doctrine of judicial review, and has provoked a considerable amount of discussion.

1. In 1650 Parliament passed an act declaring that the colonies ought to be subject to such laws, orders, and regulations as or shall be made by the Parliament of England. C. H. Firth and R. S. Rait, Acts and Ordinances of the Interregnum, II, 425-429.

H. Scobell, A Collection of Acts and Ordinances of General Use, Made in the Parliament, 1640-1656, II, 132-4. Labaree's note: The very fact that it seemed necessary to make such a declaration at a time when the crown was in abeyance lends emphasis to the general doctrine that the colonies were dependent upon the king, and not on Parliament.

2. Labaree, Royal Government in America, p. 5.

Privy Council as Final Court of Judicature

WINTHROP VS. LECHMERE, (1727)¹

The Privy Council held that an act of the colony of Connecticut, relating to the division of the property of an intestate among his children was null and void as being contrary to the law of this realm, unreasonable, and against the tenor of their character, and consequently the province had no power to make such a law.

The Privy Council maintained that in accordance with the common law of England, real estate descended to the eldest son, and that it was against reason as well as law that an only daughter should be co-heir with an only son. Thus a colonial act of nearly thirty years was invalidated. Such a procedure had a different effect from

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1. 4 Conn. Hist. Soc. Coll., 94 n.; 5 Mass. Hist. Soc. Coll., 6th Series, 440-511. References used for an explanation and exposition of the case:
 - (1) James B. Thayer, Cases on Constitutional Law, 1:136.
 - (2) H. D. Hazeltine, "Appeals from Colonial Courts to the King in Council, with especial reference to Rhode Island." Report to American Historical Association, 1894, pp. 319 ff.
 - (3) A. M. Schlesinger, "Colonial Appeals to the Privy Council," 28 Pol. Science Quarterly (June and September, 1912), 440 ff.
 - (4) E. S. Corwin, The Doctrine of Judicial Review (Princeton, 1914), Chapter I.
 - (5) C. G. Haines, American Doctrine of Judicial Supremacy.

disallowance for it rendered void all actions under the law. Since the laws of Connecticut were not laid before the Crown for approbation or disallowance, it was contended that there was no other way of enforcing the terms of the charter, which provided that the laws of the colony should not be contrary to the laws of England, than by considering acts beyond the charter as no laws at all. (See O. M. Dickerson, American Colonial Government 1696-1765 (Cleveland, 1912), pp. 275 ff., on reasons why this law was held void.) Contrary to the invariable practice the Board of Trade was not consulted in this case. The decision overturned the policy of settling estates which had prevailed in Connecticut since the foundation of the colony, and the colonial government set about vigorously to have the decision of the Privy Council reversed. A case involving a similar issue was appealed from Massachusetts and the statute of that colony relating to intestate estates was upheld. On the strength of this decision the Government of Connecticut supported another appeal to the Privy Council and was successful in having the former decree of the Council reversed, and the colonial act of 1699 validated (Clark vs. Tousey--Hazeltine, 321-322, Schlesinger, 444). If an appeal on a colonial matter involved the validity of a law of the action of an officer it was regularly referred to the Board of Trade but if a purely judicial question was raised the judicial committee of the Privy Council might settle the question directly.

There seems to be some dispute whether the decisions in such cases as those of *Winthrop vs. Lechmere* and *Phillips vs. Savage* were in the nature of judicial decrees, or whether they were rather legislative or administrative acts similar to the procedure in the disallowance of statutes. As a precedent for authority in courts of justice to declare laws invalid, it appears to make little difference whether these decrees be regarded as legislative or judicial in nature. A cursory examination of English history during this period makes it apparent that anything like a well marked separation of powers into legislative, executive, and judicial, was lacking. Nevertheless, the fact that a colonial act might be held invalid in the ordinary course of appeal to England, whether considered legislative, or judicial, or both, was recognized and well understood.

Another objection raised to these cases as precedents for the American Doctrine is that the cases were not cited by those who were responsible for the adoption of the American Practice of Judicial Review. The colonists as a rule were not content under the arrangements for appeal of cases to the Privy Council. Frequently they did everything in their power to prevent appeals, refused to carry out orders of the Council, and criticized the practice of review as one of the chief causes of irritation between the home government and the

colonies. It is not surprising then, that colonial and state justices, even if they knew of these decisions did not refer to these precedents when seeking to place limits upon legislative action.

Haines is probably making reference to E. S. Corwin, The Doctrine of Judicial Review (Princeton, 1914), page 74, when he states:

Finally, reference should be made to the early case of *Winthrop vs. Lechmere* in which, in 1727, the British Privy Council held that an act of the Colony of Connecticut relating to the division of the property of an intestate among his children was "null and void" as being contrary to the law of the realm, unreasonable, and against the tenor of their character, and consequently, the province had no power to make such a law. (Quoting Haines, 1st ed. 65.) Professor Thayer urges truly that this decree was a judicial decree: "Cases on Constitutional Law, 39-40. It was argued before the Council as a case at law; (see C. M. Andrews in Select Essays in Anglo American Legal History, p. 1445). But this fact does not make it a precedent for judicial review. The provincial legislatures, were in law mere corporations possessed of the powers of legislation of municipal councils. Such bodies to this day, as a general proposition, must not exercise their powers "unreasonably" nor the transgression of the Common Law. See the following cases: 3 Pick: 462, 6 if 187, 11 if 168, 16 if 121. The problem of judicial review arises, however, in the first instance because the legislature was supposed to possess supreme judicial powers, but latterly because of the attribution of the legislature to sovereignty. The application of the idea of sovereignty to the state legislatures creates an absolutely impossible gulf between such alleged precedents as *Winthrop vs. Lechmere*, and the institution of judicial review in the United States. Moreover, those cases were never referred to by those who developed the argument of judicial review.

Professor Thayer takes issue with Brinton Coxe

on the question of whether this was or was not in the nature of a Judicial Decree. His arguments are given in a footnote on page 39 of the first volume of his case book.

Suggestions have been made from time to time that the decisions of the Privy Council prepared the way for the decisions of the Supreme Court. They may not have served as precedents, but it would seem reasonable to conclude that they accustomed the people to the practice which was later carried out by the Supreme Court.

Mr. Russell, after making an extensive study, concludes: The Power of Review Exercised by the Privy Council

was analogous to that assumed by the Supreme Court after the formation of the new government. The Privy Council, it is true, declared acts void upon grounds other than the contravention of a fundamental law; but it frequently did disallow laws because they conflicted with the colonial charters, or with acts of the British Parliament or of the common law of England. Under its tutelage the colonists became accustomed to a limitation upon the power of their legislatures. In this sense, the work of the Privy Council constituted at once a precedent and a preparation for the power of judicial annulment upon the constitutional grounds now exercised by the State and Federal Courts in the United States.¹

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1. Elmer Beecher Russell, "The Review of American Colonial Legislation by the King in Council," Columbia University Studies in History, Economics, and Public Law (New York, 1915, Vol. 64, 63, also 221, 222.

The Case of Giddings vs. Browne

The first alleged Colonial precedent is the case of Giddings vs. Browne (1657). The case came before Symonds, a magistrate who had great respect for the learning of the lawyers of England.

¹ Professor Reinsch cites this case as an interesting example of natural law philosophy, and the first case where power is claimed by courts to declare acts opposed to fundamental law void. Furthermore, the case indicates that the New England colonists accepted the law of England only so far as it was expressive of the law of God.

Mr. Boudin objects to the citation of this case as a precedent for our theory of judicial review.² He indicates that this is not a case of constitutional law, and that the objection is not because the regulation violates a charter, nor any constitutional document. The fundamental law here, is the Law of God.

The case is as follows:

Giddings v. Browne³

A town meeting had voted £100 towards providing a house for Mr. Cobbett, a minister, and present case arose

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1. Select Essays in Anglo-American Legal History, I, 376.
 2. Government by Judiciary, I, 519 ff.
 3. 2 Hutchinson Papers, Prince. Soc., 1865, 1-15.

out of Mr. Brown's refusal to pay.

Symonds held that it is against a fundamental law in nature to be compelled to pay that which "others do give."

That positive law cannot prevail against fundamental law he supports with passages from Finch and Dalton. 97 Finch, Law, or a Discourse Thereof (1726), 74, develops the proposition that Common Law is nothing else but common reason and that positive laws contrary to it are void, as are those contrary to the laws of nature.¹

The precedents cited by Symonds are not English cases. Bonham's case is not mentioned. Two of the precedents are from the town of Ipswich, and one from Weymouth. Mr. Boudin is correct in pointing out that no question of constitutional law is directly involved, but that does not preclude the fact that magistrates were concerned with rules which were opposed to what they believed to be higher, or fundamental law. As colonial history developed, this idea became stronger, and judges and lawyers found support for their ideas in English cases, particularly in Bonham's case. It added weight to their ideas. In turn, the judges undoubtedly read into Lord Coke's doctrine more than Lord Coke himself had ever intended to state.

1. This version of the case may be found in 40 Harvard Law Review.

The Influence of Coke and Blackstone on Colonial Decisions

It is stated in the Massachusetts Colonial Records that in 1636, the general court went on record as favoring a draft of laws agreeable to the word of God.¹ There seemed to be no reference to the common law of England. However, in 1647, the general court ordered Coke's Reports, two copies of Coke upon Littleton, Coke upon the Magna Charta, the Book of Entries, the New Terms of the Law, and Dalton's Justice of the Peace.²

About twenty-five hundred copies of Blackstone were absorbed by the colonies on the Atlantic seaboard before the Revolution. James Kent found a copy when he was but fifteen years old, and John Marshall found a copy in his father's library.³

Bacon, Comyn, and Viner repeated in rather vague and general terms, the Coke Doctrine. These men too, according to Professor Haines, must have exerted an influence. The following three passages are offered as examples of this:

(1) "If a statute be against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void.

"It is to be holden, that a statute contrary to

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1. Massachusetts Colonial Records, I, 74.
 2. Hilkey, Legal Development in Colonial Massachusetts. 37 Columbia University Studies, No. 2 (1910), 66.
 3. From Select Essays on Anglo-American Legal History, I, 204.

107.

4

natural equity, as to make a man judge in his own case,
is void."

6 Bacon's Abridgement, Statute (A), 1735.

(2) "So when the words of an act of Parliament are
against common right and reason, repugnant, or impossible
to be performed, they shall be controlled by the common law."

4 Comyn's Digest Parliament (R27), 1762-67.

(3) It appears in our books, that in several cases
the common law shall control acts of Parliament,
and sometimes adjudge them to be utterly void,
for when an act of Parliament is against common
right and reason, or repugnant, or impossible to
be performed, the common law shall control it,
and adjudge it to be void.

19 Viner's Abridgement, Statutes (E,6), 1741-51

One cannot state definitely the first time that
Coke's Doctrine was used in an argument in a colonial court.
As this paper indicates, the case of Giddings v. Browne in
1657, did not make any reference to Coke, although it
expressed ideas similar to those of Coke in Bonham's Case.
The precedents, however, were from Ipswich and Weymouth.

In 1668, it is reported, Lord Coke was cited as
an authority:

The vigorous rule of Andros in 1688 set Bos-
tonians thinking about Habeas Corpus, while at
the same time the abrogation of their charter
by James II provoked an outspoken claim to
independence, in support of which they were said
to "hold forth a law book and quote the authority
of the Lord Coke to Justifie their setting up for
themselves," pleading the possession of 60 years
against the Crown." (1)

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1. An Account of the Colonys and Provinces of New England
in general, More particularly of that of the Massachu-
setts, printed from MS. Lambeth 841 in Perry-Papers
Relating to the History of the Church in Mass. (1873),
39, 42.

X

This statement is not definite; it does not mention Bonham's case, and perhaps there was no reference to it in any of the arguments. The statement merely proves that the colonists were reading Coke, and that they found in his statements certain arguments which appealed to them.

During the latter part of the 18th century, it is on record that Coke's ideas were quoted frequently. Three outstanding examples are quoted here:

I

Paxton's Case, Quincy, 51, 401 (Mass., 1761, Published 1865)

Coke's authority was used freely in Paxton's case by Otis in his indecisive attack upon the writs of assistance but still more so in an even greater cause. The disaffection caused by the Stamp Act very early took a legal complexion our friends to liberty take the advantage of a maxim they find in Lord Coke's that an act against Magna Charta or the peculiar rights of Englishmen is ipso facto void.

(26 Ms. Archives of Mass., 153-154 ff. (preserved in the State House, Boston).)

II

Plucknett records, in 40 Harvard Law Review

From 1774 on Coke's influence is obvious, and the practice of judicial invalidation of acts for unconstitutionality which had begun in Colonial days steadily grew.

See Colden's Protest, July 5, 1759, New York Historical Society Collection (1869), 204.

III

Robin et al. v. Hardaway, et al. Jeff. 109 (Va., 1772)

This case cited (1) 8 Coke, 118a, Bonham's Case

(2) Day v. Savage, Hobart, 87

(3) Calvin's Case, 7 Co. 14

Here several persons of Indian descent tried to vindicate their freedom in spite of a statute of 1682 which reduced them to slavery.

The Plaintiff's arguments were eloquent:

All acts of legislature contrary to Right and justice are void.... A legislature must not obstruct our obedience to him from whose punishment they cannot protect us. Such have been the adjudications of our courts of justice

The judges decided that the statute of 1682 was repealed by the subsequent act of 1705, and thus the case did not turn on the point of the invalidity of the act.

The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.... Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently/

(1) Madison, Constitutional Society of 1787-88
Writings Edition 1955, Vol. 1, pp. 1-11.

(2) 1 Cranch 137 (1803)

THE WRITTEN CONSTITUTION
AND JUDICIAL SUPREMACY.

A court is not without justification in giving weight to historical factors, principles which may have been begotten, and fundamental theories upon which constitutions and laws must be supposed to rest. In fact, this particular judicial power rests so plainly on purely historical forces, rather than on any piece of formal logical argument from a document, that anything less than a discussion of historical influences leaves one in doubt concerning the Court's authority.(1)

The case of Marbury v. Madison⁽²⁾ was the first to declare a congressional act void. Chief Justice Marshall, in rendering this now famous decision, stated that there was a distinction between limited and unlimited governments. The United States, he explained is a government of limited kind. Its limits are prescribed by the written constitution.

The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.... Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently/

(1) McLaughlin, Constitutional History of the U.S.
(Students Edition 1935) Pages 309-310.

(2) 1 Cranch 137 (1803)

111.

consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void.⁽¹⁾

It was Marshall's contention that the theory of judicial review was essentially attached to a written constitution. This we cannot accept to-day, for we have specific examples, such as that of France, where the country has a written constitution, but does not have judicial review of legislative acts.

Since Chief Justice Marshall has based his argument on the written constitution as superior law, it is necessary to study the historical background of the Constitution. "The Constitution of the United States was a growth... The Americans of 1776 were British.... In framing their Constitution, they simply used their own law and Constitution."⁽²⁾ Is this statement exaggerated? An investigation of the background will be made here to find the answer.

An analysis of historical factors indicates that the written Constitution of the United States was the result of ideas which had developed over a period of centuries.

Those who favored the adoption of the Constitution/

(1) Marbury .. Madison, 1 Cranch 137. (1803)

(2) Hutchison, The Foundation of the Constitution.

Constitution argued that its provisions would establish "organic living institutions transplanted from English soil."⁽¹⁾

The political argument developed by the leaders of the Revolution, - the concept of fundamental law, - inevitably led to the adoption of a written Constitution which declared the fundamental law of the land. During the revolutionary period, it was better, for propaganda purposes at least, to leave the concept of fundamental law undefined. It could then be used in an argumentative protest against certain acts of Parliament.

Methods of argument suitable for revolutionary purposes could not be used for the establishment of a stable government. Leaders of the country, such as Samuel Adams, James Otis, and Alexander Hamilton, realized that there must be stated laws, a "standing rule to live by."⁽²⁾ Thus the philosophy of fundamental law, used so effectively in developing opposition to acts of Parliament which had proved objectionable to many of the colonists, was to be used in developing a Constitution that would bind the States together into a united nation.

The leaders of the constitutional movement had steeped themselves in historical facts and political philosophy/

(1) Elliot, Debates, IV 121-2, The Federalist, Nos. 46, 47.

(2) Samuel Adams, Works II, 357, quoted in Hutchinson, The Foundations of the Constitution 1928, page 6.

philosophy, which, they believed, would furnish arguments to support their contentions.

They must have realized then, as an American student does to-day, that what is known as the British constitution cannot be found in a single document or a group of documents; that it consists of a great body of law, both common and statutory, as well as conventions, precedents, and forms of procedure which are clearly established. (1)

Yet they believed in the necessity of a single document, and they turned to the Magna Carta (1215) the Provisions of Oxford (1258) the Petition of Right (1628) the Habeas Corpus Act (1679) the Bill of Rights (1689) and the Act of Settlement (1701). They were interested in the Agreement of the People (1647) and the Instrument of Government (1653) "the first written National Constitution which actually became operative." (2)

American Colonial history is filled with examples of government under written charters. The Charter of the East India Company, December 31, 1600, which was in reality a written constitution for that important trading company, served as a pattern for many colonial charters.

A/

(1) See Labaree, Royal Government in America, (1930) p.1
 Dykes, Source Book of Constitutional History. 1.

(2) See Hutchinson, "Foundations of the Constitution"
 (1928) Chapter I. Also Goodnow, Principles of
 Constitutional Government () page 7.

A study of the Church Covenant will be made first. The influence of the Magna Carta, the concept of the sovereignty of the people, emphasized during the Commonwealth, and the plantation covenants will then be considered.

The struggle for religious freedom by the early colonists caused them to think in terms of government as well as religion. They left England as a group of dissenters; they reached the New World as a "body politic."

THE CHURCH COVENANT.

We have thus found a conspicuous principle of American constitutionalism ... in the religious movements and aspirations of the late sixteenth and early seventeenth centuries. I make no assertion that the Church covenant or the philosophy of Separatism was the sole source of certain essential principles of profound significance; but the actual realization of certain theories, the finding of objective expression, takes the doctrines out of the rarefied air of philosophical speculation.

A.C. McLaughlin. (1)

(1) McLaughlin, The Foundations of American Constitutionalism, p. 29.

It is believed by some that the idea of the covenant was carried from Scotland to England and hence to America.⁽¹⁾ Professor Hutchison says, "The origin of the church covenant is not clear. It may have been taken from the Bible and Guild Statutes, or borrowed from the Anabaptists or received from Geneva by the English Puritans."⁽²⁾

Those who believe that the idea of the covenant was introduced by the Scots into England point out as evidence that in the life time of John Knox, the Lords of the Congregation entered into covenants or treaties of alliance. Presbyterianism spread rapidly all over Scotland, and by 1639 "a whole people had gathered together to swear a mutual compact."⁽³⁾

The Covenanters of 1639 published a manifesto to Christians in the kingdom of England, in which they appealed from the King to the Parliament at Westminster and to the people of the nation.⁽⁴⁾ In 1643, "England adopted the system of covenants which had originated in Scotland."⁵

(1) Chapin, "President Roosevelt and the Supreme Court".
Scots Law Times Dec. 4, 1937, p. 249.

(2) Hutchison, Foundations of the Constitution. (1925)
p. 3.

(3) Borgeaud, Rise of Modern Democracy (1894), page 27.

(4) *ibid*, from Rushworth Collection of State Papers
1680, pages 798-802.

(5) *ibid*, page 29.

It is true that the power of the Presbyterians was soon to be taken over by the Independents, but enough has been said here to indicate the use of the Scottish Covenant by those who would resist King Charles. The important point is that an example was given to the American Colonists of a political, revolutionary use of the Covenant.

Undoubtedly the followers of Knox believed that they found an example for their particular kind of covenant in Holy Writ, and that Knox and Melville had returned to Scotland from Geneva with ideas of Church organization.

Both Borgeaud and McLaughlin trace the concept of the covenant such as we find in New England, to the teachings of one Robert Browne. He had been a follower and student of Thomas Cartwright, Professor of Divinity, at Cambridge, who had been forced to resign because of his teachings concerning religion.

In 1582, Browne published a book entitled, "A Booke which Sheweth the Life and manners of all true Christians, and howe unlike they are unto Turkes and Papistes and Heathen folke."⁽¹⁾

He defines true Christians as those who "are united into a companie or number of believers who by a willing covenant/

(1) Middleburgh (1582) British Museum C.37 E. 57.

covenant made with their God place themselves under the government of God and of Christ, keeping the Divine Law in a holy Communion." Again, he states, "The Church planted or gathered is a community or number of Christians or believers which by a willing covenant made with their God, are under the government of God and Christ, and kepe his laws in one holie communion."⁽¹⁾

Professor McLaughlin⁽²⁾ points out that fundamental principles are here plainly stated: "the independent gathering of a few believers into a self governing body, relying upon the Scriptures as their guide; the covenant with God to abide by his laws and follow in his ways."

This necessitates the assumption of individual existence and individual right. Browne did not have much to say about the right of the individual to choose for himself the road to salvation, yet as Professor McLaughlin contends, the underlying philosophical principle must be the same - the actual existence of the individual man.

The second idea which may be gained from Browne's thesis is that the separate individual, in agreement with others, could develop a church organization -

"a/

(1) Ibid, Definitions I, Cf. Def. 35, Quoted by Borgeaud, supra p. 32.

(2) McLaughlin, Foundations of American Constitutionalism, (1932) Chapter I.

119.

"a body that had its own life and being, and within a certain or uncertain area, its own authority. As the result of compact, covenant, and condition, men could form a new relationship and establish a new and real body."⁽¹⁾

Here we find the doctrine of individual liberty, in an embryonic form to be sure, but nevertheless applied to an active organization. Organizations of a similar nature were soon to be found on the opposite shores of the Atlantic.

Browne was a writer on religious, rather than civil, matters, yet he claimed that the truths which he announced should be applied to civil matters as well, and he declared that civil magistrates ought to be chosen with the consent of the people.⁽²⁾

The influence of his ideas was felt in two directions, first, by the followers of John Robinson, who fled to Holland, and thence to America, and second by those who ultimately drew up the "Agreement of the People," a constitution in the sense in which a constitution is understood in the United States to-day.⁽³⁾

Let us first consider the influence on the Pilgrims. They were not bound together by religious interests/

(1) *ibid*, page 12.

(2) Borgeaud, The Rise of Modern Democracy page 34.

(3) Borgeaud, The Rise of Modern Democracy 1894, page 43.

interests alone. In order to secure the necessary funds to sail to America they had negotiated with the Virginia Company of London and had subsequently become participants in a joint stock company. Because they were to settle as one community it was essential that they act cooperatively. Thus the interests of this community were influenced by both religion and business.

The Pilgrims who embarked at Leyden in very good spirits arrived on the New England Coast full of fear concerning the future.

What could they see but a hideous and desolate wilderness full of wild beasts and wild men: ... If they looked behind them, there was the mighty ocean which they had passed, and was now as a maine barr and goulfe to separate them from all the civill parts of the world.(1)

It was essential to draw up a separate pact, based upon their feeling of necessity to cooperate with one another, and over and above any agreement entered into as a part of the joint stock arrangement with the Virginia Company.

The Virginia Company had previously passed the following order:

"It/

(1) Bradford, History of Plymouth Plantation (1912) I, 155-156 quoted in McLaughlin, Foundations of American Constitutionalism, (1932) page 18, note 11.

"It was ordered allso by generall consent that such Captaines or leaders of Perticulerr Plantacons that shall go there to inhabite by vertue of their grauntes and Plant themselvs their tennantes and Servantes in Virginia till a forme of Government be here settled for them, associatinge unto them divers of the gravest and discreetes of their Companies, to make orders, Ordinances and Constitutions for the better orderinge and directinge of their Servantes and business provided they be not repugnant to the Lawes of England."⁽¹⁾

McLaughlin believes that the Mayflower compact was not merely the exercise of the privilege of the Mayflower's passengers granted them by the above order. It was rather a covenant, compact, or constitution, of frightened people. Terrified by the wildness of the new country and the ravages of the elements they felt the necessity of associating, as free individuals, in a form of constitutionalism.

One other explanation has been offered. It has been claimed that the Mayflower Compact is but an example of "the old sea law."⁽²⁾ It was an ancient custom, seemingly, for the passengers on board a ship, who were not subject immediately to the skipper's discipline, to organize a form of government during the period of the voyage.

An/

(1) Quoted in McLaughlin, page 19.

(2) Ibid, pages 21-23.

An account of such an agreement is furnished by a record of the members on board a ship sailing from Riga to Tramund, thirty years before the Pilgrims landed at Plymouth.⁽¹⁾

After the boat had sailed for a half day from Riga, the Captain of the ship called the forty-seven passengers together, and after urging them to pray constantly for a safe voyage, he said:

"We will

set about to ordain and establish a government by the most prudent according to the customary sea-laws; which office (as sea-law hath it) no man may refuse to undertake, but rather must be ready to exercise it strictly and without respect of persons, even as each desireth that God may deal with him at his last end and at that dreadful day, truly and without flinching, and with all diligence that may be."

At first glance, it would appear likely, that the idea of the "Sea law" contributed to the development of the Mayflower Pact. However, the pact was drawn at the end of the journey, and the passengers were binding themselves together not for a journey on the sea, but for a period of hardship on land. Thus it would appear that the admonition of their leader, (who/

(1) Cited by McLaughlin, 22-23. From Life on a House Ship, in G.G. Coulton, A Mediaeval Garner, pp.156-158. The document is extracted from J.C.V.Frichard, Frankfurtisches Archives, II 245-246.

(who did not make the journey) to become a body politick"⁽¹⁾ resulted in the Mayflower Compact.

- (1) Lastly, whereas you are to become a body politick, using amongst yourselves civill governments, and are not furnished with any persons of spetiall eminencie above the rest, to be chosen by you into office of government, let your widsome and godliness appeare, not only in chusing shuch persons as doe entirely love and will promote the commone good, but also in yielding unto them all due honour and obedience in their lawfull administrations; not beholding in them the ordinarinesse of their persons but God's ordinance for your good, not being like the foolish multitude who more honour the gay coate then (than) the vertuous mind of the man, or glorious ordinance of the Lord."

Bradford, History of Plymouth
Plantation (1912 Ed.) I, 98.

THE MAYFLOWER COMPACT.

In ye name of God Amen. We whose names are under-written, the loyall subjects of our dread Sovereigne Lord King James by ye grace of God, of great Britaine, Franc, and Ireland king, defender of ye faith, &c.

Haveing undertaken, for ye glorie of God, and advancemente of ye christian faith and honour our king & countrie, a voyage to plant ye first colonie in ye Northene parts of Virginia. Doe by these presents solemnly & mutually in ye presence of God, and one of another, covenant, & combine our selves together into a Civill body politick; for our better ordering, and preservation & furtherance of ye ends aforesaid; and by Vertue hereof to enacte, constitute, and frame such just & equall lawes, ordinances, Acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie: unto which we promise all due submission and obedience. In witnes whereof we have hereunder subscribed our names at Cap-Codd ye 11. of November, in ye year of ye raigne of our soveraigne Lord King James of England, France, & Ireland ye eighteenth and of Scotland ye fiftie fourth. Ano. Dom. 1620

Martin: An Introduction to the Study of the American Constitution, page 349 as recorded in Martin etc.

The idea of the Covenant seemed to be in the minds of leaders who sailed to America shortly after the Mayflower Pilgrims.

John Winthrop wrote on board the Arabella:-

"The work we have in hand is by mutual consent ... to seek out a place of cohabitation and consortershipp under a due form of Government both civill and ecclesiastical. Thus stands the cause between God and us. We are entered into Covenant with Him for this worke ... The Lorde hath given us leave to drawe our own articles ... Now if the Lord please to hear us, and bring us in peace to the place we desire, then hath he ratified this Covenant and sealed our Commission, and will expect a strict performance of the article contained in it."⁽¹⁾

(1) Massachusetts Historical Society, Collections.
Third Series VII, 45-46.

The Colonists and the Law of God.

To the Puritans, the law of nature, the law which Locke and other philosophers postulated before government and social order were founded, this law which was all inclusive and permanent, inevitably assumed theological significance. The law of nature was the law of God as well as the law of reason, and God Himself was the embodiment of unchanging reason and inviolable law. (1)

When the Pilgrims landed at Plymouth Rock in 1620, problems created by a new environment raised questions of conduct and government, and answers were given at first by their leaders, but later solutions were advanced in the form of concrete regulations and laws.

The people who sailed from Holland and Plymouth "were Brownist separatists of plebian origin".⁽²⁾ Two fundamental principles they carried with them, democracy in religious faith, and the belief that government should be by and for the body politic. These concepts, however, could not exist for long, in a new country where the control was in the hands of trading companies, and in a land where ministers and magistrates considered themselves interpreters and administrators of the Lord's will.

(1) McLaughlin, Foundations of American Constitutionalism, pp. 26-27.

(2) Ibid.

One of the first ministers, and the first teacher to the church of New Boston, was John Cotton. He believed in establishing a Presbyterian Commonwealth, with the Bible as the law of the land. The Bible, he believed, was of universal application; the scriptures furnished rules for all social and political problems. Human laws were inferior. "The more any law smells of man the more unprofitable." (1)

In 1636 and 1637, Cotton drafted a code of laws which furnishes illustrations of his attitude. The code was drafted only after there had been frequent demands from the colonists that they have a definite set of statutes. Cotton presented a crude system, based upon his interpretation of the Bible. Here is a reference to inheritances:

Inheritances are to descend naturally to the next of kinne, according to the law of nature, delivered by God.

If a man have more sonnes than one, then a double portion to be assigned and bequeathed to the eldest son, according to the law of nature, unless his own demerit deprive him of the dignity of his birthright. (2)

(1) Quoted in Parrington, The Colonial Mind, Vol i, p. 32. (See Hutchinson, History of Mass. Bay Colony)

(2) References to Cotton's code, which was rejected, may be found in Wright, American Interpretations of Natural Law, pp. 17-18.

The last lines of Cotton's code are as follows:

The Lord is our Judge
The Lord is our Law-giver
The Lord is our King. He will save us.

Isay. 33:22. (1)

Closely associated with John Cotton in the religious and political development of the colony was the magistrate, John Winthrop, who can be classified more
(2)
as a magistrate-elder than as a civil governor.

He had been a lawyer, squire, and magistrate in England.

As a magistrate under the dominance of the English common law, he seems to have accepted the constitutional theory of Coke, who sought to interpose the customary and ancient law of the land between the growing absolutism of the Crown and the increasing importance of the Commons, with sovereignty inhering in the judiciary. As a Puritan, however, he superimposed the law of Moses on the law of the land, and by ignoring the King on one hand, and denying power to the representatives of the people on the other hand, he created the framework of a magisterial theocracy. (3)

(1) Wright, ppl7-18.

(2) Parrington, The Colonial Mind, Vol 1, p. 38.

(3) Ibid, p. 44.

Winthrop was little given to speculative thought, and his contributions to political problems^m are short, yet they are perhaps more significant than the lengthy dissertations of ministers who wrote from a view point which was far more ecclesiastical than political. (1)

In his longest writing on the theory of government, Arbitrary Government Described and the Government of Massachusetts Vindicated from that Aspersions Winthrop clearly reveals that his belief^{is} that the fundamental laws of the state are from God.

Those which God gave
to the Commonwealth of
Israell were a sufficient
Rule to them, to Guide all
their Affaires: we Havinge
the same, with all the
Additions, explanations
and deductions, which
have followed: it is not
possible we should want a
Rule in any case: if God
give wisdom to discerne it. (2)

Thus Winthrop argues that it is not necessary to draft a code, for the magistrate can make decisions in accordance with the word of God.

&

(1) Wright, American Interpretations of Natural Law, p. 26.

(2) Winthrop, Life and Letters of John Winthrop, vol. ii, p. 445. Quoted by Winthrop, and by Wright.

Two other tracts written by Winthrop are of interest here:

- (1) Replie to the Answer made to the Discourse about the Negative Vote.
- (2) Speech on Liberty and Authority.

In the first tract he defends his attitude as governor and argues that the negative vote should not be abolished. Winthrop argues for a state held static by exact constitutional arrangements. (1)

In the second tract, Winthrop states:

"It is yourselves who have called us to office, and being called by you, we have our authority from God, in way of an ordinance, such as hath the image of God eminently stamped upon it, the contempt and violation whereof hath been vindicated with examples of Divine vengeance. (2)

In conclusion, Winthrop may be cited as one who believed in a fundamental law, a rigid constitution, and absolute power of decision in the magistrate.

(1) Parrington, The Colonial Mind, vol.i, p. 44.

(2) Wright, American Interpretations of Natural Law, p. 28.

The Magna Carta.

Magna Carta is the declaration of one generally binding law. It enounces and it consecrates and it is in itself Lex Terrae, the law of the whole land, and of all persons therein. It is for us of the English stock the parent of all instruments defining the relation of the citizen and the sovereign. It is the ancestor of your own Federal Constitution, as well as the "Bill of Rights" provisions of all state constitutions. (1)

Thus did Lord Bryce address the American Bar Association on August 28, 1907.

Bishop Stubbs has written that "the whole of the Constitutional history of England is a commentary on this charter." (2) From the many references to the Magna Carta which may be found in American Constitutional law cases, it may be inferred that the influence of the great charter has been felt in America as well.

The American colonists regarded the Magna Carta as a sacred document which, from the very first, had protected the liberties of Englishmen. (3)

It is almost unnecessary to state that the view adopted by modern scholarship is very different. The merits of the charter must be considered with reference to both past and present.

(1) 24 Law Quarterly Review, p. 16

(2) Stubbs, Select Charters, p. 296

(3) Corwin, 42 Harvard Law Review, p. 175

McKecknie states:

The importance of the Charter for the men of 1215 did not lie in what forms its main value for constitutional theorists today. To the barons of Runymede its merit was that it was something definite and utilitarian—a present help for present ills. To them it was by no means what it became to the English lawyers and historians of a later age, who looked on it as something intangible and ideal, a symbol standing for the essence of the constitution, a bulwark of English Liberties. (1)

It was the charter of the 17th century interpretations, the Magna Carta of Coke, Hampden, and Pym, rather than the original charter of 1215, that entered into American constitutional theory.

The feudal grievances had been forgotten by the seventeenth century, and Coke, "that unrivalled master of the intricacies of the common law" had found a new use for the old charter. It could be used as a precedent for reform. Thus it was argued that an act which seemed socially undesirable was contrary to right, reason, the law of nature, the law of God, and Magna Carta. Coke noted that in the confirmation of 1368, the declaration was added by statute that any statute passed contrary to Magna Carta "soit tenez p' nul." (2)

The footnotes below are for the preceding page.

(1) Magna Carta Commemoration Essays, p. 9.

Professor McKecknie states:

It would seem that three separate periods may be distinguished, in each of which the chief merits of ~~the~~^h Charter have been differently rated, being found respectively in its reference to the present, the future, and the past.

He indicates that the Barons at Runnymede found merit in the ^h Charter because it was something definite and utilitarian. It would render immediate assistance to the ills from which they suffered at that time. English lawyers of a later period looked upon it as something intangible and ideal, a symbol of liberty, standing for the essence of the Constitution. In the present day the Charter is looked upon as a helpful way of reconstructing the past. "The vivid glimpses that the Charter gives us of life in England in the early thirteenth century open, as it were, a window into the past."

(2) 3 Coke Inst. III. I Stat. Realm 388 (1368)

Following the suggestion of Professor H. D. Hazeltine in considering the influence of the Magna Carta on American Constitutional development, the constitutional history of the United States might well be divided into three periods:

- (1) The colonial period, beginning with the grant by James I of the first Virginia Charter in 1606, and ending in 1760.
- (2) The period of the American Revolution.
- (3) The period dating from the Treaty of Paris in 1783. (1)

In the first period the colonists developed the idea that they were entitled, by virtue of the fact that they were Englishmen, to the laws and privileges of Englishmen. (2)

It will be remembered that Sir Edward Coke carried on his fight against the use of the King's prerogative at the time that colonization was under way, and is it possible that the colonists carried from Great Britain, or more properly, from England, vivid memories of this insistent advocate, who urged limitations on royal power, and freedom of the judges in making decisions.

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- (1) See Hazeltine's article in Magna Carta Commemoration Essays, p.180ff.
 - (2) An application of Coke's statement (12 Coke 29) "the law and the custom of England is the inheritance of the subject."

His praise of the Magna Carta and his dictum in Bonham's case that a law contrary to right and reason is null and void, caused the colonists in the next century to continue their interest in his writings, and they noted that his statements could be quoted to advantage in pressing their case.

It must be admitted that the colonists displayed an amazing amount of independence in their reception of the common law.

So far as the English common law protected them from the English Government and the royal officials they looked upon it as their right by birth; so far as it interfered with their development, it was to be disregarded. (1)

The great ocean which separated the colonists from the mother country helped them to maintain this attitude. When Parliament refused to recognize such an independent spirit, a feeling of hostility developed among the colonists.

From the very first, Magna Carta was considered as an instrument of help and protection.

In 1606, when James I granted the Virginia Charter,

(1) Channing, History of the United States, (1905) vol. 1 p. 529.

the method of royal grant by means of charters commenced in America. It is reported that Sir Edward Coke took part in developing the final draft of the charter to the Virginia Company,⁽¹⁾ although it is supposed that Sir John Popham prepared the first draft.⁽²⁾

The charter and instructions reveal a mixed form of organization. It was in one sense private or proprietary, in another, public or royal. The right to develop property and trade was granted to the "loving subjects" and their associates, but powers of government were not given directly to members of the Virginia Company. The King governed the colonies through three councils. The members of the first council were selected by the Crown, while the members of the other two councils were selected by the first, or "royal" council. Thus a rudimentary form of colonial organization was developed, which in time was bound to be changed because of insistence by the colonists and people in England as well.

The charter granted the same constitutional rights to the people of Virginia as those possessed by Englishmen in the homeland.⁽³⁾

(1) Magna Carta Com. Essays, p. 185. Also Osgood, American Colonies in the 17th Century v.1, p. 26

(2) Ibid. (3) Ibid, p. 187.

The exact wording of the charter relative to the rights of the colonists is that they "shall have and enjoy all Liberties, Franchises, and Immunities... to all intents and purposes as if they had been abiding and born within this our realm of England, or any of our said Dominions."⁽¹⁾

It appears to be a liberal grant with regard to personal liberties, but, from the standpoint of constitutional law, the charter's grant of powers to the Virginia Company is very limited. Not until the third charter (1612) was there any definite plan of constitutional government. The 1612 charter granted and distributed legislative, executive, and judicial powers, and served as a precedent for the later state constitutions. Hutchison speaks of this charter as a rough draft or outline for the later state constitutions, and the Constitution of the United States.⁽²⁾

The early British colonists had definite views of justice and right. They brought with them the fruits of the "struggle for law" in England.

(1) Quoted from the King James Charter. See Magna Carta Commemoration Essays, p. 188; also MacDonald's Select Charters and Other Documents Illustrative of American History, 1606-1775, pp. 1-11.

(2) Hutchison, Foundations of the Constitution, p. 3.

Reinsch states that the colonists made their earliest appeals to common law considering more its public than private law aspects. They thought of the common law in its character ⁽¹⁾ as a guarantor of English liberties.

It is fair to conclude that the extreme ignorance of the colonists with regard to common law often caused them to place an undue emphasis on Magna Carta. To some, Magna Carta was the complete embodiment of the common law, and it is reported in Virginia, when a question arose whether an act was contrary to the common law, the committee examined the Magna Carta to settle the question. ⁽²⁾

The express declaration found in most colonial charters that the colonists did possess the legal rights of Englishmen in the homeland meant a great deal to the people in America. It would appear that settlers who claimed territory in the name of England would be entitled to the rights of the English constitutional system, regardless of the express statement from the King. Yet to the colonists, this stipulation was regarded as a compact between the King and themselves, and it was never forgotten.

(1) Reinsch, "Colonial Common Law", found in Select Essays in Anglo-American Legal History, vol. 1, pp. 414-415.

(2) Ibid, p. 414.

Hazeltine says that this declaration of the Royal Charters was an extremely important factor in the spread throughout the colonies of English constitutional principles, including the rights and liberties secured by the Magna Carta and its confirmations.⁽¹⁾

It cannot be said that Magna Carta served as a basis for the government of Plymouth. The Mayflower compact was more to the inhabitants of that territory than a guarantee in a Royal charter. They depended upon the Bible for their guide, and Divine law, as revealed by their ministers and magistrates, was applied. Yet even in this unique religious environment, we find John Winthrop, who had opposed too great a restraint upon the judges through fixed regulations and laws, admitting that it would be well to have a general law like Magna Carta, in order to restrict capital punishment.⁽²⁾

The people of Plymouth were anxious to have positive laws, but the ministers discouraged them for some time from adopting a written code. Finally, the deputies, deploring the lack of positive law, and believing that too much discretion upon the part of magistrates and ministers might cause unfortunate results, decided to appoint a group of men who should frame a body of law, resembling Magna Carta.

(1) Magna Carta Commemoration Essays, pp. 189-190

(2) Ibid, p. 192.

On May 25, 1636, the General Court ordered a body of laws drawn up agreeable to the word of God. This resulted in the "Body of Liberties" (December 1641).

After a three weeks' session, the General Court adopted one hundred laws. They had been drafted by Nathaniel Ward, who had served as the pastor at Ipswich, and who had also been trained in the common law. Ward's original draft was not accepted by the Court without alteration. After the Court had made several changes, the "Body of Liberties" was then sent to every town, where it was read, and suggestions were then sent to the Court for further consideration. This drawn out procedure covered a period of three years. (1)

Eight years before this Massachusetts had received its first charter, in which permission had been granted for the governor, assistants, and free men of the company to make, "ordeine, and establishe all manner of wholesome and reasonable orders, lawes, statutes, and ordinances, direction and instructions not contrarie to the lawes of this our realm of England." (2)

(1) See R. C. Winthrop, Life and Letters of John Winthrop, p. 267.

(2) Macdonald, Documentary Source Book of American History, 1606-1698, p. 25.

The provision in the colonial charters that the laws of the colonies should not be contrary to the laws of England encouraged the idea already existing in the colonies, that there is such a thing as a "higher" or "fundamental" body of laws.

According to Winthrop, the General Court had for many years opposed the enactment of laws in advance of actual necessity. The conditions in the colony caused problems to develop which the magistrates and ministers could not always anticipate, and they quite reasonably argued that the solution of for each problem depended upon the parties and facts of each case. Such a degree of independence had been used by the officials in deciding the individual cases, that the colonists felt it necessary, for their own security, to have a definite, established set of rules.

The first article of the "Body of Liberties" , in the words of Professor Hazeltine, "echoes the spirit of chapter thirty-nine of Magna Carta.⁽¹⁾ It provides that "no man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be restrayned, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children,

(1) Ibid, p. 193.

no man's goods or estaite shall be taken away from him, nor any way indammaged under colour of law, or countenance of authority, unless it be by vertue or equitie of some express law of the country warranting the same, established by an generall Court and sufficiently published, or in case of the defect of the law in any particular case by the word of God. And in Capitall cases, and in cases concerning dismembering or banishment, according to that word to be judged by the Generall Court." (1)

The "Body of Liberties" was not the first code drawn up in New England. As early as 1637 a written code had been drawn up in New England to the south of Massachusetts, in the portion known as Rhode Island, and even before this a covenant had been drawn up in New Hampshire for the control of political affairs. (2)

It has been claimed that the "Fundamental Orders of Connecticut", drawn up by the towns of Windsor, Wethersfield, and Hartford, are evidence "of the first written constitution known to history that created a government." (3)

The "Fundamental Articles of New Haven" refer to a plantation covenant. This was different

(1) MacDonald, Select Charters, pages 73, 74.

(2) McLaughlin, Foundations of American Constitutionalism, pp. 26-27

(3) Ibid.

from the church covenant, although the form and procedure is very much the same. The difference is in the subject matter, the plantation covenant being concerned with civil affairs, the church covenant with religious affairs of the community. However, the civil or plantation covenants clearly showed the influence of religion. In the opening paragraph of the "Fundamental Orders of Connecticut" one reads:

" Well knowing where a people are gathered together the word of God requires that to maintain peace and union of such a people there should be an orderly and decent government established according to God..." (1)

Thus the state constitutions and the Constitution of the United States were patterned after other written instruments, and in particular, Magna Carta and the covenants, both religious and civil, of the New England colonists. Even where the covenant prescribed the plan of government, the colonists were aware of the Magna Carta as an example of a written instrument.

(1) MacDonald, Select Charters, p. 61.

The Puritan Revolution in England.

The question has often been asked whether the colonists were influenced in matters of local government by the Puritan revolution in the British Isles. The men of New England, and in particular, Massachusetts, were acquainted with the history of the English rebellion; and "they fastened in their minds the logic of the contract origin of government".⁽¹⁾

President Goodnow of Johns Hopkins University has stated that the Americans were following the example of their British forefathers.⁽²⁾ Certain events are interesting to note; (1) the destruction of the monarchy and the short-lived commonwealth under Cromwell, and (2) the adoption of the written constitution in 1654, said to be the earliest written constitution in modern Europe.⁽³⁾

It is quite natural that the Puritans of New England should follow the rise and fall of the Cromwell government in their native land. The issues and consequences of that struggle interested the New Englander from both the religious and political points of view. Many of the colonists had returned to New

(1) McLaughlin, Foundations of American Constitutionalism, p. 102

(2) Goodnow, Princ. of Constitutional Government, p. 7

(3) Ibid.

England after visits in the homeland. Other colonists returned to England and remained there. Many of the Puritans had returned to England as early as the middle of the reign of James I. They met secretly in London and established a congregation there.⁽¹⁾ In 1640 the dissenters returned in large numbers from America and Holland. The sermons of Cotton, Hooker, Mather, and other Divines were published and distributed openly in London.⁽²⁾

Similarity of religious faith was the first cause of interest and influence, but this in turn gave rise to similarity of political belief, with primary emphasis on the sovereignty of the people. During the period when the colonists were clarifying their political doctrines through written covenants and declarations, the Agreement of the People and the Instrument of Government were examples of the revolutionists' desire to have a definite statement of fundamental law. They desired something beyond and above the common law. Magna Carta was a fragmentary and incomplete statement, they thought; as Cromwell stated, "a beggardly thing" although he advocated "something like Magna Carta".

(1) Borgeaud, Rise of Modern Democracy pp. 36-37

(2) Ibid. See also, McIlwain, The High Court of Parliament, p. 92, n. 1.

The revolutionists were aware of the ppractical value of Magna Carta . They argued that if an ancient document like the Magna Carta could curb the power of a King or the Parliament, then a new document could be used for a similar purpose. This new document would contain their conception of government. It would be free from the restrictions and encumbrances of the old law. There is evidence to indicate that the new document should be binding and unalterable. Thus we have the trial of something new in British history,-
(1)
the written constitution.

In the heat of political controversy and revolution, it is difficult to estimate ~~the~~ the weight of chance statements. It is even more difficult to evaluate them three centuries later. Just what influence the Magna Carta had on the political leaders of the period of the rebellion is somewhat uncertain. Lilburne at one time made a plea for the observance of Magna Carta, agreeing with a contemporary that it was "lying prostrated, besmeared and grovelling in her own gore".
(2)
Yet Lilburne made the same use of Magna Carta that the American Colonists did. Those who opposed him or his beliefs opposed Magna Carta.

(1) McIlwain, The High Court of Parliament, pp.91-92.
McIlwain quotes Cromwell cited supra.

(2) Lilburne, Fundamental Liberties of England, 1649.

Mullett states that the name and the writings of Lilburne were often quoted in the footnotes of American colonial pamphlets. (1)

In his own defense, Lilburne relied on the rights granted by Magna Carta. In one place he writes, "Neither can Iⁱⁿ/reason or in justice conceive...how you can deprive me of the benefit of those just laws, viz. Magna Carta, Petition of Right..." (2)

In a tract entitled John Lilburne Tryed and Cast or His Case and Craft Discovered, we read in answer, "Here he speaks home for liberty: malefactors are not only to choose their jury, but their judges too: so that Magna Carta is to be understood of liberty granted unto murtherers, Theeves, Traytors: But before true men, honest and faithful to the state, there is no help for them, as to their liberty and security." (3)

It is unnecessary to state that such quotations are of little value if one observes them from a legal point of view. Such quotations regard the personal rights of a single individual. The important point, however, is that Lilburne was quoted widely by the colonists, and they considered his statements from a political, and even legal point of view, to be representative of their cause.

(1) Mullett, Fundamental Law and the Amer. Rev. p. 54.
 (2) Scottish National Library, Pamphlet No. 168, p. 12.
 (3) Ibid, p. 133.

Lilburne wrote a pamphlet entitled, "The Peoples Prerogative and Privileges, Asserted and Vindicated (Against All Tyranny Whatsoever) By Law and Reason, Being A Collection of The Marrow and Soule of Magna Charta, and All The Most Principall Statutes Ever Made Since To This Present Yeare, 1647, For the Preservation of The Peoples Liberties and Properties."

Professor McIlwain states that we cannot help but notice the inconsistencies in Lilburne's writings. At the time of his trial he had much to say concerning fundamental law; but at another time, he repeated the statement attributed to Cromwell, that the Magna Carta was but a beggarly thing, "containing much..and many marks of intolerable bondage, and the laws that have been made ever since by Parliaments have in many particulars made our government more oppressive and intolerable."⁽¹⁾

This attitude is easily understood when one realizes that these words came from a revolutionist who would be inclined quite naturally to oppose the government and Parliaments of the past. What Lilburne probably meant was that Magna Carta was not a sufficient grant to the people. However, when he made a plea in his own behalf, he relied upon the traditional appeal to the rights of Englishmen contained in the Magna Carta.

(1) High Court of Parliament, pp. 90-91.

It is necessary to reject the idea that the American colonists were influenced by the Puritan revolutionists in England to revere Magna Carta. The respect which Coke had for that document was not apparent among the leaders during the English Civil War. The contributions to colonial political thought were along different lines; namely, the example of a written constitution for a national government, and the emphasis on the sovereignty of the people.

When Roger Williams of Rhode Island went to England in 1643 to obtain a charter for Rhode Island, he found England engaged in civil strife. He remained a year before he gained what he desired. Williams stayed at the home of Sir Henry Vane, and through that gentleman he was able to obtain a charter from the colonial committee giving the Providence Plantations liberty to develop the form of government which they long desired. (1) Vane was a believer in the sovereignty of the people. He suggested that the most natural way to form the government would be by a general council or convention "of faithful, honest, and discerning men chosen for that purpose by the free consent of the whole body of adherents." (2)

(1) Borgeaud, Rise of Modern Democracy, p. 159.

(2) McLaughlin, Foundations of American Constitutionalism, pp. 102-103.

Vane's ideas may be found in Somer's Tracts : (1)

..Which convention is not properly to exercise the legislative power, but only to debate freely, and agree upon particulars; that, by way of fundamental constitutions, shall be laid and inviolably observed as the conditions upon which the whole body so represented doth consent to cast itself into a body politick incorporation... which conditions so agreed... will be without danger of being broken or departed from; considering of what it is they are the conditions and the nature of the convention wherein they are made, which is of the people represented in their highest state of sovereignty.

When Roger William returned to Rhode Island, the people of that colony entered into a new covenant in which they accepted the charter Rogers had procured from England.

It is agreed... that the form of government established in Providence Plantations is Democratically... a government held by the free consent of all, or the greater part of the free inhabitants. (2)

(1) Somer's Tracts, VI, p. 312. Somer's Tracts are cited frequently by McLaughlin in his discussion of the covenant and its influence.

(2) Records of Rhode Island, vol.i, p. 156.

Yet the influence of Magna Carta is apparent, for the declaration of rights states that no person in the colony shall be imprisoned, or disseized of his lands, his liberties, or be exiled, molested or destroyed, but by "lawfull judgment of his Peers, or by some known law, and according to the letter of it, ratified and confirmed by the major part of the general assembly lawfully met and orderly managed."⁽¹⁾

Provisions similar to those found in the Magna Carta were incorporated in other charters of liberty, although some of them did not receive the Royal assent, because they granted too large a measure of freedom to the colonists, threatening the Crown's Prerogative and the legislative supremacy of Parliament. In the records of New York, one may discover that the Duke of York secured trial by jury, provided for Habeas Corpus, and its charter contained many provisions of Magna Carta. This charter of liberties did not receive Royal assent.⁽²⁾

In Maryland, the colonial assembly passed a bill to recognize Magna Carta as a part of the law, but this was disallowed by the King, as the Attorney General had warned him that this might be inconsistent with the Royal Prerogative.⁽³⁾

(1) Records of Rhode Island, vol. 1, p. 157

(2) Magna Carta Commemoration Essays, pp. 195-196.

(3) Ibid.

In 1712 the colonial legislature of South Carolina adopted the English Common law, and a large number of English statutes, including Magna Carta. In
(1)
1715 North Carolina passed a similar act.

Hazeltine points out that Magna Carta became a generic term. When it was stipulated by a colonial legislature that Magna Carta was to be adopted, it included other constitutional documents as well. The very names Magna Carta and Bill of Rights were transmitted, "and terminology in this case, as so often in the history of institutions and laws, masked no mere shadow but the very flesh and blood of living
(2)
rights."

Not only is there a great deal of evidence that Magna Carta, or the principles found therein, were embodied in the charters and written laws of the colonial governments, but it can be shown that the principles of Magna Carta were incorporated in the colonial case law.

According to Hazeltine, this was done by the courts in at least four ways. (1) In cases interpreting

(1) Magna Carta Commemoration Essays, pp.195-196.

(2) Ibid, p. 20.

and applying colonial legislation. Examples of this would be the Rhode Island Code of 1647, the Massachusetts "Body of Liberties", and the New York "Charter of Liberties". (2) Cases where the interpretation and application of colonial acts which adopted the whole text of the Magna Carta were involved. (3) Cases decided where the colony had adopted all of the English law as the rule of colonial adjudication. (4) "in decisions of the many courts that were engaged, together with other institutions of the colonies, in adopting and adapting, either consciously or unconsciously, such portions of the English law as best suited the legal requirements of the colonial law communities." (1)

In conclusion, it is clear that the colonists continued to adopt and adapt Magna Carta, even during the period of civil war in the homeland, when Magna Carta did not have the same prestige as it did during the life of Sir Edward Coke. The two contributions of the Commonwealth were (1) the written national constitution, and (2) increased emphasis on the doctrine of the sovereignty of the people. As will be seen in the next few pages, certain ideas in Magna Carta became incorporated in the Constitution of the United States and thus became fundamental law.

(1) Magna Carta Commemoration Essays, pp. 202-203.

Magna Carta and the Constitution of the U. S.

In the past few pages we have noticed the influence of Magna Carta on early American charters, statutes, and cases. State constitutions adopted certain provisions of Magna Carta, the Bill of Rights, and other important statutes in English constitutional law. With the failure of the Articles of Confederation, plans were advanced for a written federal constitution which was destined to become the fundamental law of the United States of America. It is only natural that the national constitution should incorporate ideas of the early charters and state constitutions. James Wilson, ⁽¹⁾ born and bred in Scotland, said to be the greatest authority on constitutional law in the American constitutional convention, was chief among those who advocated the adoption of the ideas of many British constitutional documents.

Sir Frederick Pollock has stated, "Our fathers laboured and strove chiefly in the field of Crown law to work out those ideals of public law and liberty which are embodied in the Bill of Rights and are familiar to American citizens in the Constitution of the United States and of their several commonwealths." (2)

(1) Born near St. Andrews; attended St. Andrews, Edinburgh, and Glasgow Universities.

(2) "The Genius of the Common Law".

Bryce, in American Commonwealth (1) and Dicey, (2) in Law of the Constitution consider the use of British Constitutional documents by the constitutional leaders of the United States. Specific examples are: (3) (4) (I) taxation by legislature only, (I) trial by jury, (III) for the prohibition of bills of attainder, (5) (IV) laws impairing obligation of contracts. (6)

The absence of a specific Bill of Rights brought forth criticism, and the first ten amendments were incorporated to protect the liberties of the people. Later the thirteenth, fourteenth and fifteenth amendments were added, and these may be regarded as a part of the specific rights respecting the liberties of the people. (7)

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- (1) Bryce, American Commonwealth (1910) vol. i, pp. 426-463.
 - (2) Dicey, Law of the Constitution (1915) P. 195, n. 1.
 - (3) Art. I., section viii.
 - (4) Amendment VII; Article III, section ii.
 - (5) Article I, section viii, also prohibits ex post facto laws.
 - (6) Article I, section x.
 - (7) These amendments were passed after the American Civil War. The eleventh amendment deals with judicial power, and the twelfth amendment with the Electors.

CONCLUSION.

Appendices D and E record some of the misconceptions and confusion which exist in the minds of the American people concerning the historical background of judicial review. This lack of understanding is the result of (1) fragmentary and incomplete evidence concerning the subject, and (2) biased opinions, either for or against judicial review, upon the part of leaders in American political and intellectual life. For examples in political life, we have Mr. Roosevelt and the members of Congress in opposition to him on the Supreme Court issue. Mr. Brinton Coxe wrote a book on the Supreme Court for the purpose of defending judicial review, while Mr. Boudin wrote a book for the purpose of attacking the review of legislation by the Supreme Court. ⁽¹⁾ Objective scholarship has been difficult when attempted in the heat of controversy.

As has been stated, the purpose of this thesis is not to prove that judicial review is either desirable or undesirable, but rather, to evaluate the British background in three ways: (1) The Fundamental Law Concept; (2) Legal Precedent in British Law; (3) The Written Constitution.

(1) Coxe, Brinton, Judicial Power and Unconstitutional Legislation. (Philadelphia)

(2) Boudin, L. S. Government by Judiciary (N. Y.)

(1) Fundamental Law.

It is necessary to differentiate between the vague theoretical concept of fundamental law, and the development of certain portions of the common law into the American fundamental law (i. e. the incorporation of trial by jury, etc. in the American written constitution.)

The theoretical concept of fundamental^{law} was developed long before the common law existed. In one form or another, it was recognized by the Greeks, the Romans, and the Mediaeval Canonists. While an effort has been made to trace the fundamental law concept from Bracton to Coke, it has never been recognized by the common law courts to the same extent that it has been recognized by the civil law courts.

The concept of fundamental law developed^{ed} in the colonies because (1) Puritanism encouraged the idea of the law of God, and (2) the colonists discovered that an appeal to fundamental law was a means of expressing their opposition to acts of Parliament. As their opposition to Parliament grew, they eagerly gleaned every reference to fundamental law that they could find in common law texts and cases. From early colonial days the colonists thought of Magna Carta as fundamental law. Charters and covenants also contained fundamental laws, thought the colonists.

The colonists became used to disallowance of laws, by the Privy Council and the Board of Trade, or by the King in the Royal colonies, when a local law was contrary to the laws of England. The laws of England were considered as laws of a fundamental nature. When Parliament passed acts which were disliked by the colonists, they took the next logical step, and argued that there were laws more fundamental than the acts of Parliament. Thus through religion, practice, and circumstance, the concept of fundamental law was encouraged.

With the failure of the Articles of ^{CON}Federation, the American constitutional leaders realized that laws must be formulated which would bind the states together into one nation. Thus the concept of fundamental law which had been used for revolutionary purposes was used for the purpose of uniting thirteen colonies into one nation.

Alexander Hamilton was familiar with certain passages of Cicero's writings, but there is little evidence to indicate that he was thinking of the Roman law concept when he was speaking of fundamental law. Hamilton, Wilson, Marshall, and other constitutional leaders were thinking of (1) a fundamental law for preservation of specific "inalienable rights" and (2) a fundamental law that would preserve the union of states.

LEGAL PRECEDENT IN BRITISHLAW.

For the purpose of clarity, a distinction should be made between British cases which furnish an analogy for judicial review, and those which serve as strict legal precedents for judicial review.

An analogous situation can be found in cases where a law or rule making body, exercises delegated authority, and passes what purports to be a rule of law which falls before what is to it a higher or fundamental law. Thus colonial laws when inconsistent with their charters fell before them. Any ordinance of a British municipality contrary to its charter would like wise fall.

The writer is of the opinion that it is futile to look for any " direct precedent " for judicial review in English law. The dictum in Bonham's Case is of historical interest, but does not serve as a direct precedent, because (1) the issue was not between the legislative and judicial powers of the nation, but between the power to declare law by the ordinary court and the power to declare law by the High Court of Parliament, and (2) no written constitution was involved in Bonham's Case.

Apparently Coke had in mind the law of nature or the Divine law when he spoke of acts contrary to right and reason. One important U. S. Supreme Court decision, Loan Association v. Topeka, 20 Wall. 665, appears to have been decided on similar reasoning. This case appears to be alone, and generally speaking, American Courts recognize no higher law unless it has been incorporated in a written constitution.

Professor Plucknett's able discussion and analysis of Bonham's Case in the Harvard Law Review has an unfortunate closing paragraph, in which he seems to indicate that judicial review developed as a result of Vattel's theoretical discussions concerning a written constitution, and Coke's statement in Bonham's Case. The writer trusts that Professor Plucknett was only thinking of an interesting ending when he stated, "Finally, there came the reception of Vattel's theoretical discussions, which coincided with the ^{from} dicta of the English Judge. It was due not only to that doctrine, but also the firm faith that 'what my Lord Coke says in Bonham's Case is far from any extravagancy' that we ~~held~~ owe the bold experiment of making a written constitution which should have judges and a court for its guardians." (1)

THE WRITTEN CONSTITUTION.

Chief Justice Marshall made no reference to Bonham's Case when the case of Marbury v. Madison was decided, but he did state that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature repugnant to the constitution is void."

From the very beginning, the American colonists had either written charters or covenants. The Puritans had scriptural authority for the covenant.(1) The charters contained guarantees of the rights of Englishmen. The written document became a symbol of good government. From the very first, the colonists indicated their desire to have a written covenant, charter or constitution. Vattel, Locke, and other writers expressed ideas which the colonists held before reading the discussions of political theorists. The hesitation of certain states to accept the American Constitution indicates their belief in its binding effect.

(1) Joshua xxiv. 25--"So Joshua made a covenant with the people that day, and set them a statute and an ordinance in Shechem."

It was clear to Marshall that the theory of the separation of powers could not work out in practice. Yet to argue for "government by judiciary" would have been fatal.

Human nature was an important factor in the development of the American Constitutional System. The leaders in the constitutional convention decided that the country should not have a king, and they mistrusted legislative supremacy, for they had not forgotten their conflicts with Parliament at Westminster. Furthermore the state legislative assemblies were unpopular at the time the constitution was being drafted. Marshall knew the mind of the American, he understood the citizen's faith in the written governmental instrument. True, there had been mistrust of the new constitution, but this mistrust had been overcome. The constitution had been accepted as the instrument of government. Thus Marshall appealed to the people. The constitution must be protected. Who could guard it but the judicial body?

The people of the United States still regard the Constitution as a sacred document, the outgrowth of faith in Magna Carta, early charters, and covenants. Judicial review is the result of the able arguments of Marshall at the appropriate time. It is possible to find analogies in British history, but no direct precedent, either in common law or civil law, has yet been found.

APPENDIX A.

CASES IN THE COURTS OF MASSACHUSETTS AND OTHER STATES.

Introduction.

1755. In APPENDIX, 5187 (Conn.), 444,

447, it was held that an act of the General Assembly of Conn. The appendix contains material of a supplementary nature. Lists of earlier cases than Marbury v. Madison, quotations from the writings of the constitutional fathers, and evidence which would not lend itself to classification in the thesis proper.

their consent and the grant to Secretary being given to the grant and to the issue of Marbury and Madison documents from the reports of the Committee Upon the Duty of Courts to Refuse to Execute Statutes in Contravention of Fundamental Law.

The writer is indebted to the New York City Bar Association for the use of the Reports. The materials were compiled by the committee.

1893, 52, headnote :

"An act of the legislature which violates the right to assess the value of property where, prior to the constitution, the assessment could only be made by a jury, is in conflict with the clause of the constitution which provides that trial by jury shall be preserved, and the right thereof cannot be violated, and is therefore void."

When an act of the legislature violates the right to assess the value of property for the non-performance of a duty, it is void."

APPENDIX A.

CASES IN THE SEPARATE COLONIES AND STATES.

Connecticut.

1785. In Symsbury case, Kirby (Conn.), 444, 447, it was held that an act of the General Assembly of Connecticut confirming surveyor Kimberlay's line "operated to restrict and limit the western extent of the jurisdiction of the town of Symsbury, but could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent; and the grant to Symsbury being prior to the grant made to the towns of Hartford and Windsor, under which the defendant claims, we are of opinion the title of the lands demanded as in the plaintiffs."

Kentucky.

1801. In Stidger v. Rogers, 2 Kentucky Decisions, 52, headnote :

"An act of the legislature which authorizes the court to assess the value of property where, prior to the constitution, the assessment could only be made by a jury, as in conflict with the clause of the constitution which provides 'that trial by jury shall be as heretofore, and the right thereof remain inviolate,' and is therefore void.

"An act of the legislature which authorizes the court to award fifteen per centum damages for the non-performance of a contract,

made before the act was passed, changes the obligation of the contract, and is void."

Maryland.

1802. In *Whittington v. Polk*, 1 Harris & Johnson (Maryland), 236, 241-6 headnote :

"An act of assembly repugnant to the constitution is void. The court have a right to determine an act of assembly void which is repugnant to the constitution."

Massachusetts.

1786. In *Brattle v. Hinckley* and in *Brattle v. Putnam*, 7 Harvard Law Review, 415-7, 419-20; a Bancroft's History of the Constitution, 473 (Letter Cutting to Jefferson), the Supreme Court of Massachusetts declared void statutes providing that in suits brought by absentees during the Revolutionary War to recover debts, judgment for all interest accruing during the war should be suspended until further action of the legislature.

New Jersey.

1780. In *State v. Parkhurst*, 9 New Jersey Law, 427, the court say (9 New Jersey Law, 444):

"At an early period of our government, while the minds of men were yet unbiassed by party prejudices, this question was brought forward, in the case of *Holmes and Walton*, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men;

and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional, and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six men jury, was repealed, and a constitutional jury of twelve men substituted in its place. This, then, is not only a judicial decision, but a decision recognized and acquiesced in by the legislative body of the state."

1796 :

"In later days, in the case of Taylor v. Reading, a certain act of the legislature, passed March, 1795, upon the petition of the defendants, declaring that in certain cases payments made in continental money should be credited as specie, was by this court held to be an ex post facto law, and as such unconstitutional, and in that case inoperative.

"And with this decision before them (for the act was made pending the suit), and as I humbly conceive, fully acquiescing therein as to matter of principle, the legislature afterwards, in January, 1797, passed another act for the relief of the said defendant, Reading, in another way. These two cases in New Jersey, * * * both afterwards brought into the notice, and acquiesced in, and if I may so say, sanctioned by the legislature, would be sufficient to rule the question."

1804. State v. Parkhurst, 9 New Jersey Law, 427, 442-4, headnote :

"The Supreme Court has power to declare an act of the legislature void, as being contrary to the constitution."

New York.

1784. In Rutgers v. Waddington, 1 Thayer Cases on Constitutional Law, 63, 68-72, the Mayor's Court

of the City of New York refused to execute a statute authorizing actions of trespass by the owners of houses against the occupants thereof under orders of the British commander-in-chief.

North Carolina.

1787. Bayard v. Singleton, 1 Martin (North Carolina). 42, 44-5, it was held that an act of North Carolina passed in 1775, "requiring the court to dismiss on motion, the suits brought by persons, whose property had been confiscated, against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional and void."

1802. In Ogden v. Witherspoon, 2 Haywood (North Carolina), 404-7, syllabus :

"The legislature, by an act passed in 1799, declared that a law passed in 1715 has continued and shall continue in force; it was a question at the time of the passage of the act of 1799, whether the act of 1715 was not repealed by a law passed in 1789; held that the determination of this question belonged to the Judiciary and not to the legislature; and that therefore the act of 1799, so far as it regards this question, contravenes the fourth section of the bill of rights and is void."

1805. In Trustees of the University v Foy, 5 North Carolina (1 Murphey), 58, 81, 83-9, it was held that a North Carolina act of 1800 repealing legislative

grants made in 1789 and 1794 of all escheated and confiscated property to the University of North Carolina, and reverting the granted property to the State, was void, being in violation of the State Bill of Rights.

Ohio.

1807-8. In Ohio the Court of Common Pleas for the third circuit, constituting a majority of the State Supreme Court, held a State law of 1805, giving jurisdiction to justices of the peace in cases exceeding \$20, unconstitutional as impairing the constitutional right of trial by jury. One of the judges was thereafter elected governor, and an attempt continued through two legislative sessions to impeach all three of them failed. (I Chase's Statutes of Ohio, 1833, pp. 38-40; Cooley Constitutional Limitations, 7th ed., 229-30 note.)

Pennsylvania.

1793. *Austin v. University of Pennsylvania*, 1 Yeates (Pa.), 260-1, headnote :-

"The act of assembly vesting Isaac Austin with a messuage, etc., passed 6th August, 1784, adjudged to be unconstitutional."

1799. In *Respublica v. Duquet* 2 Yeates (Pa.), 493, 501, the Supreme Court of Pennsylvania asserted

the power of the judiciary to declare a law unconstitutional.

1808. In *Emerick v. Harris*, 1 Binney (Pa.), 416, 419-23, 425, the Supreme Court of Pennsylvania again asserted the power of the judiciary to decide upon the constitutionality of Scots laws.

Rhode Island.

1786. In *Trevett v. Weeden*, Cooley Constitutional Limitations, 7th ed., p. 229; 1 Thayer Cases on Constitutional Law, 73-4; 2 Chandler's Criminal Trials, 269-350, the Superior Court of Rhode Island refused to execute a State law imposing a penalty upon every person who refused to receive State bills in payment for articles offered for sale, or should make distinction in value between State bills and silver and gold.

South Carolina.

1789. In *Ham. v. M'Claws*, 1 Bay (South Carolina), 93, 98, it was held that a State statute of 1788 forfeiting any negro imported into South Carolina except from another State, and when owed by a citizen of the United States, was null and void.

1805. In *White v. Kendrick*, 1 Brevard (South Carolina), 469, 470-3, headnote :

"The act of assembly of 1801, extending the jurisdiction of justices of the peace to thirty dollars, was adjudged to be unconstitutional."

Tennessee.

1807. In Miller's Lessee v. Holt, 1 Overton, 242, 244-5, it was held that Tennessee had no right to pass an act perfecting titles within what had been North Carolina.

In Page v. Pendleton, Wyde, Virginia
Chancery, 211, 213-5, head Virginia.

1778. In May, 1778, an act of Virginia attainted one Phillips unless he should render himself to justice within a limited time; after the time expired he was taken and brought before the court to receive sentence of execution pursuant to the attainder. But the court held the attainder invalid, and he was put upon his trial according to due process of law. (I Tucker's Blackstone, ed. 1803, p. 293, appendix; 5 Political Science Quarterly, 235).

1782. In Commonwealth v. Caton, 8 Virginia (4 Call), 5, 8, 16-20, it was held that a resolution of the house of delegates, without the consent of the senate, pardoning three persons condemned for treason, was unconstitutional inoperative and void.

1788. In case of the judges, 8 Virginia (4 Call), 135, 142-6, it was held that the legislature had no

power under the State Constitution to reduce the number of judges of the Court of Appeals, but could remove all the officers of the court.

1792. Turner v. Turner, 8 Virginia (4 Call), 234, 237-8, headnote :-

"Ex post facto laws are contrary to the principles, of the constitution."

1793. In Page v. Pendleton, Wythe, Virginia Chancery, 211, 213-8, headnote :

"A debt due to a British creditor was not discharged by payment in paper money into the loan office, under the act of 1788, which enacted that such payments should have that effect".

1793. In Kamper v. Hawkins, 1 Virginia Cases, 20, 23-8, it was held that a statute requiring judges of the District Courts to exercise also the functions of the Court of Chancery was unconstitutional.

Georgia, New Hampshire, Tennessee and Vermont.

Vermont held that a State court had power to declare a State law unconstitutional in 1814 (Dupy v. Wickwire, 1 D. Chipman, 237, 238-9): New Hampshire in 1826 (Woart v. Winnick, 3 N. H., 473); Tennessee in 1836 (Union Bank v. State, 17 Tenn. 490) and Georgia in 1848 (Flint River Steamboat Co. v. Foster, 5 Georgia, 194, 204-5).

The principal judicial opponent of Chief Justice Marshall was Chief Justice Gibson of Pennsylvania, who as late as 1825 contended that while it was the duty of the judiciary to refuse to execute any law, State or Federal, that was in violation of the Federal Constitution, it had no right to refuse to execute a State law which was in contravention of the State Constitution. (Eakin v. Raub. 12 Sergeant & Rawle, 345-58, Gibson, J.)

In Norris v. Clymer, 2 Pa. State, 277, 281 (1845), Chief Justice Gibson concurred with Chief Justice Marshall's views, saying (281):

"I have changed that opinion for two reasons. The late" State Constitutional "Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature ; and from experience of the necessity of the case."

Samuel Adams, in his speech in the Massachusetts

Convention in support of the constitution, which carried

the side in that convention in favor of the constitution

was, "The People's Choice, 1780."

"It removes a doubt which may be raised respecting the propriety of the constitution."

APPENDIX B.

IDEAS OF EARLY STATESMEN.

Thomas Jefferson, Samuel Adams and Patrick Henry, the leaders of the radicals and fathers of the bill of rights embodied in the first to the tenth amendments, all believed it was the duty of the judiciary to refuse to execute laws in excess of or in contravention of the constitution, and particularly to enforce the bill of rights.

As Jefferson put it, a constitutional bill of rights was necessary, because of "the legal check which it puts into the hands of the judiciary."

5 Jefferson's Works (Ford ed.), 80-1 :

"In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent and kept strictly to their own department merits great confidence for their learning and integrity. In fact what degree of confidence would be too much for a body composed of such men as Wythe, Blair and Pendleton ?

Samuel Adams, in his speech in the Massachusetts convention in support of the constitution, which turned the tide in that convention in favor of its ratification, said (2 Elliot's Debates, 131) :

"It removes a doubt which many have entertained respecting the matter, and gives assurance

that, if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the constitution of this State, it will be an error, and adjudged by the courts of law to be void."

Patrick Henry, 3 Elliot's Debates (Virginia Convention), said (pp. 324-4):

"The honorable gentlemen did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. * * * I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

Patrick Henry (Virginia Convention), 3 Elliot's Debates, 539-41 :

"In what a situation will your judges be, when they are sworn to preserve the Constitution of a State and of the general government ! If there be a concurrent dispute between them, which will prevail? They cannot serve two masters struggling for the same object. The laws of Congress being paramount to those of the states, and to their constitutions also whenever they come in competition, the judges must decide in favor of the former. * * * The judiciary are the sole protection against a tyrannical execution of the laws. * * * When Congress, by virtue of this sweeping clause, will organise these courts, they cannot depart from the Constitution ; and their laws in opposition to the Constitution would be void. If Congress, under the specious pretence of pursuing this clause, alter it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void."

4. Jefferson's Works (Letter to James Madison,
Dec. 20, 1787), 476-7 :

"Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences."

5. Jefferson's Works (Letter to William Rutledge, Feb. 2, 1788), 4 :

"I am glad to hear that our new constitution is pretty sure of being accepted by states enough to secure the good it contains, and to meet such opposition in some others as to give us hopes it will be accommodated to them by the amendment of its most glaring faults, particularly the want of a declaration of rights."

5. Jefferson's Works (Letter to James Madison, Feb. 6, 1788), 5 :

"I am glad to hear that the new Constitution is received with favor. I sincerely wish that the nine first conventions may receive and the four last reject it. The former will receive it finally, while the latter will oblige them to offer a declaration of rights in order to complete the union. We shall thus have all its good, and cure its principal defect."

5. Jefferson's Works (Letter to James Madison, July 31, 1788), 45 :

"I sincerely rejoice at the acceptance of our new constitution by nine states. It is a good canvas, on which some strokes only want re-touching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights."

Id., 47 :

"I hope therefore a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their state governments in most instances."

5. Jefferson's Works (Letter to Francis Hopkinson, March 13, 1789), 76-7 :

"I approved, from the first moment of the great mass of what is in the new constitution.
* * * What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases ~~of~~ determinable by the laws of the land. I disapproved also the perpetual reeligibility of the President. * * * My first wish was that the nine first conventions might accept the constitution, as the means of securing to us the great mass of good it contained, and that the four last might reject it, as the means of obtaining amendments.

But I was corrected in this wish the moment I saw the much better plan of Massachusetts and which had never occurred to me. With respect to the declaration of rights I suppose the majority of the United States are of my opinion; for I apprehend all the anti federalists, and a very respectable proportion of the federalists think that such a declaration should now be annexed. The enlightened part of Europe have given us the greatest credit for inventing this instrument of security for the rights of the people * * *."

5. Jefferson's Works (Letter to Noah Webster, Dec. 4, 1790), 254-5:

"The purposes of society do not require a surrender of all our rights to our ordinary governors; that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove. * * *

These fences against wrong, which they meant to exempt from the power of their governors, in instruments called declarations of rights and constitutions; and as they did this by conventions which they appointed for the express purpose of reserving these rights, and of delegating others to their ordinary legislative, executive and judiciary bodies, none of the reserved rights can be touched without resorting to the people to appoint another convention for the express purpose of permitting it."

5. Jefferson's Works (Letter to President Washington, Sept. 9, 1792), 104-5 :

"No man in the United States I suppose, approved of every title in the Constitution ; no one, I believe approved more of it than I did. * . * My objection to the constitution was that it wanted a bill of rights. * * * Colo Hamilton's was that it wanted a king and house of lords. The sense of America has approved my objection and added the bill of rights, not the king and lords. I also thought a longer term of service, insusceptible of renewal, would have made a president more independent. My country has thought otherwise, and I have acquiesced implicitly. * * * Notwithstanding my wish for a bill of rights, my letters strongly urged the adoption of the constitution, by nine states at least, to secure the good it contained. I at first thought that the best method of securing the bill of rights would be for four states to hold off till such a bill should be agreed to. But the moment I saw Mr Hancock's proposition to pass the

constitution as it stood, and give perpetual instructions to the representatives of every state to insist on a bill of rights, I acknowledged the superiority of his plan, and advocated universal adoption."

5. Madison's Works (Letter to Thomas Jefferson, Oct. 24, 1787, enclosing a copy of the constitution), 22-3 :

"The due partition between the general and local governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; some for indefinite power of legislation in the congress, with a negative on the laws of the states; some for such a power without a negative; some for a limited power of legislation, with such a negative; the majority finally for a limited power without the negative. The question with regard to the negative underwent repeated discussions, and was finally rejected by a bare majority. As I formerly intimated to you my opinion in favor of this ingredient, I will take this occasion of explaining myself on the subject. Such a check on the states appears to me necessary.

1. To prevent encroachments on the general authority.

2. To prevent instability and injustice in the legislation of the states.

1. Without such a check in the whole over the parts, our system involves the evil of imperia in imperio. If a complete supremacy somewhere is not necessary in every society, a controlling power at least is so, by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other. If the supremacy of the British Parliament is not necessary as has been contended for the harmony of that Empire; it is

evident I think that without the royal negative or some equivalent control, the unity of the system would be destroyed. The want of some such provision seems to have been mortal to the ancient confederates, and to be the disease of the modern."

Id. 26-8 *

"It may be said that the judicial authority, under our new system will keep the states within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal against a state to the supreme judiciary; that a state which would violate the legislative rights of the Union, would not be very ready to obey a judicial decree in support of them * * *.

2. A constitutional negative on the laws of the states seems equally necessary to secure individuals against encroachments on their rights. The mutability of the laws of the states is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the confederation to its immediate objects. A reform therefore which does not make provision for private rights, must be materially defective. The restraints against paper emissions, and violations, of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controlled by some provision which reaches all cases whatsoever. The partial provision made, supposes the disposition which will evade it."

5. Madison's Works (Speech on Amendments to the Constitution, June 8, 1879), 380-1.

"In the declaration of rights which that country 'Great Britain' has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite. * * * Yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. * * *

A different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the Federal Constitution, we shall find that although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency."

Id. 385 :

"It has been said that it is unnecessary to load the constitution with this provision" (a bill of rights), "because it was not found effectual in the constitution of the particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated ; but it does not follow but they may have to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights ; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security, there is a great probability that such a declaration in the

APPENDIX C.

FRAMERS OF THE CONSTITUTION.

All the framers of the constitution, who have expressed their opinions on the subject (except four, one of whom subsequently changed his views and agreed with the majority) approved of the judiciary refusing to execute acts in excess of or in contravention of the federal constitution.

Alexander Hamilton, The Federalist, No. 78

(9 Hamilton's Works, Lodge's ed. 484-6) :

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. * * *

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would

be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid. * * *

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

If there should happen to be an irreconcilable variance between the two, that which has the superior obligation, and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

James Madison, 5 Elliot's Debates, 355-6 :

"Mr Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and it would be a novel and dangerous doctrine, that a legislature could change the constitution under which it held its existence. * * * He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a constitution. * * * In point of political operation, there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be

respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements.

In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation." (See also 2 Farrand Records of the Federal Convention, 92-3).

James Madison, 5 Elliot's Debates, 321 :

"Mr Madison considered the negative on the laws of the State as essential to the efficacy and security of the general government. The necessity of a general government proceeds from the propensity of the states to pursue their particular interests, in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. * * * They will pass laws which will accomplish their injurious objects before they can be repealed by the general legislature, or set aside by the national tribunals. * * * In Rhode Island, the judges who refused to execute an unconstitutional law were displaced; and others substituted by the legislature, who would be the willing instruments of the wicked and arbitrary plans of their masters." (See also 2 Farrand, 27-28).

James Madison, 5 Elliot's Debates, 164 :

"An association of the judges in his revisionary function would both double the advantage and diminish the danger. It would also enable the judiciary department the better to defend itself against legislative encroachments." (See also 1 Farrand, 138).

5 Elliot's Debates, 344-5 :

"It would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments." (See also 2 Farrand, 74).

James Madison (Virginia Convention), 3 Elliot's Debates, 532:

"The first class of cases to which its jurisdiction extends are those which may arise under the constitution; and this to extend to equity as well as law. It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the union are secured by these restrictions."

William R. Davie, 4 Elliot's Debates (North Carolina Convention), 155-6:

"For my own part, I know but two ways in which the laws can be executed by any government. If there be any other, it is unknown to me. The first mode is coercion by military force, and the second is coercion through the judiciary. With respect to coercion by force, I shall suppose that it is so extremely repugnant to the principles of justice and the feelings of a free people, that no man will support it. It must, in the end, terminate in the destruction of the liberty of the people. I take it, therefore, that there is no rational way of enforcing the laws but by the instrumentality of the judiciary. From these premises we are left only to consider how far the jurisdiction of the judiciary ought to extend. It appears to me that the judiciary ought to be competent to the decision of any question arising out of the constitution itself. * * *

It is necessary in all governments, but particularly in a federal government, that its judiciary should be competent to the decision of all questions arising out of the constitution * * * Without a judiciary, the injunctions of the constitution may be disobeyed, and the positive regulations neglected or contravened."

John Dickinson (2 Farrand, The Records of the Federal Convention, 299):

"Mr. Dickenson was strongly impressed with the remark of Mr. Mercer as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute. The justiciary of Aragon he observed became by degrees the law giver."

In one of his Fabius letters written in advocacy of the constitution in 1788, Dickinson says (Ford Pamphlets on the Constitution, 184):

"In the president, and the federal independent judges, so much concerned in the execution of the laws, and in the determination of their constitutionality, the sovereignties of the several states and the people of the whole union, may be considered as conjointly represented."

Oliver Ellsworth, 2 Elliot's Debates (Connecticut Convention), 196:

"This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made

independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so." (See also 3 Farrand, 240-1).

5 Elliotts Debates, 462-3:

"Mr. Gouverneur Morris thought the precaution as to ex post facto laws unnecessary, but essential as to bills of attainder.

Mr. Ellsworth contended, that there was no lawyer, no civilian, who would not say that ex post facto laws were void of themselves. It cannot, then, be necessary to prohibit them.

Mr. Wilson was against inserting anything in the constitution as to ex post facto laws. It will bring reflections on the constitution, and proclaim that we are ignorant of the first principles of legislation, or are constituting a government that will be so. * * *

Mr. Carroll remarked, that experience overruled all other calculations. It had proved that, in whatever light they might be viewed by civilians or others, the state legislatures had passed them, and they had taken effect. * * *

Mr. Williamson. - Such a prohibitory clause is in the Constitution of North Carolina; and though it has been violated, it has done good there, and may do good here, because the judges can take hold of it." (See also 2 Farrand, 376.)

Elbridge Gerry, 5 Elliot's Debates, 151:

"Mr. Gerry doubts whether the judiciary ought to form part of it" (the council of revision), "as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power

of deciding on their constitutionality. In some states the judges had actually set aside laws, as being against the constitution. This was done, too with general approbation." (See also 1 Farrand, 97.)

Elbridge Gerry (1789 in debate on president's power of removal) 4 Elliot's Debates. 393:

"We then proceed to lay a duty of twenty or thirty dollars per head on the importation of negroes. The merchant does not contrue the constitution in the manner that we have done. He therefore institutes a suit, and brings it before the supreme judicature of the United States for trial. The judges, who are bound by oath to support the constitution, declare against this law; they would therefore give judgment in favor of the merchant."

Elbridge Gerry (1789 on debate on Secretary of foreign affairs), 1 Annals of Congress, 491 - 2:

"Are we afraid that the President and Senate are not sufficiently informed to know their respective duties? * * * If the fact is, as we seem to suspect, that they do not understand the constitution, let it go before the proper tribunal; the judges are the constitutional umpires on such questions."

William Grayson (Virginia Convention), 3 Elliot's Debates, 567:

"If the Congress cannot make a law against the constitution, I apprehend they cannot make a law to abridge it. The Judges are to defend it. They can neither abridge nor extend it."

Governor Johnston (North Carolina Convention), Elliot's Debates, 187-8:

"The Constitution must be the supreme law of the land; otherwise, it would be in the power of any one state to counteract the other states, and withdraw itself from the Union.

The laws made in pursuance thereof by Congress ought to be the Supreme law of the land; otherwise any one state might repeal the laws of the Union at large. Without this clause, the whole Constitution would be a piece of blank paper. Every treaty should be the supreme law of the land; without this, any one state might involve the whole Union in war. * * *

Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void."

Rufus King (1 Farrand, Records of the Federal Convention, 98):

"Mr. King seconds the motion, observing that the Judges ought to be able to expound the law as it should come before them, free from bias of having participated in its formation."

Rufus King (1 Farrand, 109):

"Mr. King was of opinion that the Judicial ought not to join in the negative of a law, because the Judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution."

John Marshall, 3 Elliot's Debates (Va. Convention)

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"Has the Government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the

the mode of transferring property, or contracts or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

Luther Martin, 5 Elliot's Debates, 346-7*

"Mr. L. Martin considered the association of the judges with the executive as a dangerous innovation as well as one that could not produce the particular advantage expected from it. A knowledge of mankind, and of legislative affairs, cannot be presumed to belong in a higher degree to the judges than to the legislature. And as to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative." (See also 2 Farrand, 76.)

Luther Martin's letter to Maryland Convention of which State he was Attorney General, 1 Elliot's Debates, 380:

"Whether, therefore, any laws or regulations of the Congress, any acts of its President or other officers, are contrary to, or not warranted by the Constitution, rests only with the judges, who are appointed by congress, to determine; by whose determination every state must be bound."

George Mason, 5 Elliot's Debates, 347:

"It has been said (by Mr. L. Martin), that if the judges were joined in this check on the laws, they would have a double negative, since their expository capacity of judges they would have one negative. He would reply, that in this capacity they could impede in one case only the operation of laws. They could declare an unconstitutional law void." (See also 2 Farrand, 78.)

Gouverneur Morris 5 Elliot's Debates, 321:

"Mr. Gouverneur Morris was more and more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the judiciary department, and, if that security should fail, may be repealed by a national law." (See also 2 Farrand 28.)

5 Elliot's Debates, 355.

"Legislative alterations not conformable to the federal compact would clearly not be valid. The judges would consider them as null and void." (See also 2 Farrand, 92).

Convent Carson's History, Supreme Court of the United States, 122, quotes Gouverneur Morris, "Address to the Assembly of Pennsylvania against the abolition of the Charter pf the Bank of North America," delivered in 1785, as saying:

"The boasted omnipotence of legislative authority is but a jingle of words. In the literal meaning, it is impious. And whatever interpretation lawyers may give, freemen must feel it to be absurd and unconstitutional. Absurd, because laws cannot alter the nature of things; unconstitutional, because the Constitution is no more if it can be changed by the legislature. A law once passed in New Jersey which the judges pronounced to be unconstitutional, and therefore void. Such power in judges is dangerous; but unless it somewhere exists the time employed in framing a bill of rights and form of government was merely thrown away."

Charles Pinckney (South Carolina Convention),
4 Elliot's Debates, 257-8:

"The judicial he conceived to be at once the

the most important and intricate part of the system. That a supreme federal jurisdiction was indispensable, cannot be denied. * * * It may be easily seen that, under a wise management, this department might be made the keystone of the arch, the means of connecting and binding the whole together * * * that, in republics, much more (in time of peace) would always depend upon energy and integrity of the judicial than on any other part of the government - that, to insure these, extensive authorities were necessary; particularly so were they in a tribunal constituted as this is, whose duty it would be not only to decide all national questions which should arise within the Union, but to control and keep the State judicials within their proper limits whenever they shall attempt to interfere with its power."

Edmund Randolph, 3 Elliot's Debate (Va. Convention), 205:

"If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be corrupted! No man says anything against them; they are more independent than in England."

Edmund Randolph's letter to Washington,
August 5, 1792 (10 Sparks' Life of Washington, 513):

"It is much to be regretted, that the judiciary, in spite of their apparent firmness in annulling the pension law, are not what sometime hence they will be, a resource against the infractions of the constitution on the one hand, and a steady asserter of the federal rights on the other."

Roger Sherman, 5 Elliot's Debates, 321:

"Mr. Sherman thought it" (congressional power to negative all state laws) "unnecessary, as the courts of the States would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negatived" (See also 2 Farrand, 27.)

5 Elliot's Debates, 321-2:

"Mr. Sherman - Such a power involves a wrong principle - to wit, that a law of a state contrary to the Articles of the Union would, if not negatived, be valid and operative." (See also 2 Farrand, 28.)

John Rutledge (In Congress, 1802) endorsing Hamilton's views, said (4 Elliot's Debates. 446):

"The complete independence of the courts of Justice is essential in a limited constitution; one containing specified exceptions to the legislative authority; such as that it shall pass no ex post facto law, no bill of attainder, etc. Such limitations can be preserved in practice no other way than through the courts of Justice, whose duty it must be to declare all acts manifestly contrary to the Constitution void. Without this, all the reservations of particular rights or privileges of the states or the people would amount to nothing."

James Wilson, 5 Elliot's Debates, 344:

"It had been said, that the judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of those characters of a law, and of counteracting, by the weight of their opinions, the improper views of the legislature. Mr. Madison seconded the motion." (See also 2 Farrand, 73).

James Wilson, 2 Elliot's Debates (Pa. Convention)

489: *James Wilson* advocated state bills of credit which were

"The honorable gentleman from Cumberland (Mr. Whitehill) says that laws may be made inconsistent with the Constitution; and that therefore the powers given to the judges are dangerous. For my part, Mr. President, I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument ~~of~~ in Congress, the judges,

as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law."

Of the four framers of the Constitution, who during the debates in the Federal convention or prior to its adoption expressed the opinion that Judges should not refuse to enforce unconstitutional laws, John Dickinson of Delaware changed his views. (See his later views quoted above.)

Gunning Bedford of Delaware, John F. Mercer of Maryland and Richard Spaight of North Carolina were probably among the supporters of a council of revision (like the Federal Council of the German Empire), or a Congressional negative on State laws.

VIII. The opposition to the Federal Constitution was led by three classes of popular leaders.

Demagogues, like those who in Rhode Island ruled and preyed by playing upon the prejudices of the farmers as against the professional men, merchants and inhabitants of the towns. The demagogues advocated State bills of credit which were legal tender for their fiat value, but which were worthless in specie; stay laws; laws for the confiscation of loyalists' property, and others forms of State confiscation, repudiation, and spoliation

that the Federal Constitution was designed to and did put an end to.

Patriots like Patrick Henry, who were extreme States rights men, and who believed that the new Federal Government armed with the purse in the power of direct taxation in lieu of requisitions upon the States; with the sword in the standing army and navy in lieu of requisitions for State militia, but without any bill of rights to restrain it from tyranny, would gradually absorb the rights of the States, and might suppress the rights of the citizen as well.

Henry feared that the independence of the State judiciary would be destroyed, and that in the absence of a bill of rights to restrain Congress, unless the Federal courts rigidly upheld the Federal constitution, a consolidated congressional despotism might be substituted for the parliamentary one that the revolution had overthrown.

(3 Elliot's Debates, 49-61, 137, 151-5, 169, 314, 445-8, 539-45; 4 Samuel Adams' Works (Cushing ed.), 324-5 333-4).

Melancton Smith, who in the New York Convention feared that Congress would interpret the constitution for itself, and thus create a consolidated congressional despotism, which the Federal Courts could not

or would not check (Annulment of Legislation by Supreme Court, Horace A. Davis, 7 American Pol. Science Review, 575-6.)

Lawyers like Robert Yates, who claimed that the Federal Courts would gradually absorb the supreme power and subvert the State Governments. (Annulment of Legislation by Supreme Court, Horace A. Davis, 7 Am. Pol. Science Review, 577-9; see, also John Dickenson's views quoted above.)

The demagogues' fears have been forgotten.

Henry's and Smith's fears were realised to some extent in the South during reconstruction: Yates's and Dickenson's fears have never been realised.

High Court of the United States, 1803-1804, the American Revolution, 1776-1777, the view of the court, 1776-1777, the United States, 1776-1777, the repeal of the stamp act, the Imperial-Imperial duty of interference a pound upon tea, which led to the American Revolution, was intended to be laid for the service of the Imperial Government to make a more efficient Colonial Government and also to support a Colonial army under the control of the British Cabinet, and not in any way for the local relief or benefit of the British Treasury.

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APPENDIX D.

STATEMENT OF THE NEW YORK BAR 1915.

The American revolution was a lawyers' revolution to enforce the principle laid down in Lord Coke's, Lord Hobart's and Lord Holt's decisions that acts of parliament against common right or in violation of the natural liberties of Englishmen were void. Every colonial lawyer and some of the Royal Colonial Judges believed that Parliamentary taxation of the Colonies, without representation, although for imperial purposes, was unconstitutional. By the right of the sword, as John Adams put it (IX Adam Works, 390-1; McIlwain, High Court of Parliament, pp.63. 309-10), the American Revolution established Lord Coke's view of the common law as the constitutional law of the United States. It must be borne in mind that after the repeal of the stamp act, the imperial import duty of threepence a pound upon tea, which led to the American Revolution, was intended to be laid for the service of the Imperial Government to make a more efficient Colonial Government and ultimately to support a Colonial army under the control of the British Cabinet, and not in any way for the local relief or benefit of the British treasury.

343-58,370-2.

In Bonham's Case, 8 Coke Rep. 114a, Lord Chief Justice Coke says (118a):

" And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."

In Day v Savadge, Hobart, 85, headnote :

"An act of parliament made against natural equity, as to make a man a judge in his own cause, is void."

Lord Chief Justice Hobert says (87 a-b):

"Because even an act of parliament, made against natural equity, as to make a man judge in his own case, is void in itself.

In City of London v. Wood, 12 Modern, 669 ,
Lord Chief Justice Holt says (687):

"It is against all laws that the same person should be party and judge in the same cause * *
* The Judge is agent, the party is patient, and the same person cannot both be agent and patient in the same thing; but it is the same thing to say that the same man be patient and agent in the same thing, as to say that he may be judge and party; and it is manifest contradiction. And what my Lord Coke says in Dr. Bonham's case, in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or, which is the same thing, judge his own cause, it would be a void act of parliament; for it is impossible that one

should be judge and party, for the judge is to determine between party and party, or between the government and party; * * * but it cannot make one that lives under a government judge and party. An act of parliament may not make adultery lawful * * *."

6 Bacon's Abridgment Statute (A):

"If a statute be against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void.

"It has been holden, that a statute contrary to natural equity, as to make a man judge in his own cause, is void * * *."

4 Comyns's Digest, Parliament (R.27):

"So where the words of an act of Parliament are against common right and reason, repugnant, or impossible to be performed, they shall be controlled by the common law."

19 Viner's Abridgment, Statutes (E.6), Construction of Statutes:

"15. It appears in our books, that in several cases the common law shall control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void."

In the famous case of Monopolies, 11 Co., 84, 86a-87b, Chief Justice Popham, and his associates held that a grant of the exclusive right to manufacture playing cards within the realm was void as

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against the common law. Such a grant, although it was made by the crown, was in its essence only an act of legislation. It was a general prohibition. It forbade everybody but the patentee to manufacture, import or sell playing cards. The principle of the case was therefore an assertion of the judicial power to review the validity of legislative acts, whether by the crown or by the parliament.

1761. James Otis, Writs of Assistance cases, Quincy, Mass. Rep. 474, says :

"As to acts of Parliament: an act against the constitution is void: an act against natural equity is Void."

(Quincy, 521-7, Appendix by the late Mr. Justice Gray):

"His" (Otis) "main reliance was the well known statement of Lord Coke in Dr. Bonham's case - 'It appeareth in our books, that in many cases the common law will control Acts of Parliament and adjudge them to be utterly void; for where an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void' (Coke Rep. 118a). Otis seems also to have had in mind the equally familiar dictum of Lord Hobart - 'Even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself * * *' (Day v. Savadge, Hob.87). Lord Holt is reported to have said, 'What my Lord Coke says in Dr, Bonham's case in his 8 Rep. is far from any extravagancy, for it is a very reasonable and true saying, That if an act of Parliament should ordain that the same person should be party and judge, or what is the same thing, judge in his own cause, it would be a void act of Parliament (City of London v. Wood, 12 Mod. 687).'

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"The law was laid down in the same way, on the authority of the above cases, in Bacon's Abridgment first published in 1735; in Viner's Abridgment, published 1741-51, from which Otis quoted it; and in Comyn's Digest, published 1762-7, but written more than twenty years before. And there are older authorities to the same effect. So that at the time of Otis's argument his position appeared to be supported by some of the highest authorities in the English law, (Bac. Ab. Statutes, A. Vin. Ab. Statutes, E. 6 pl. 15; ante. 51; Com. Dig. Parliament, R. 27 * * *). The same doctrine was repeatedly asserted by Otis and was a favorite in the colonies before the Revolution."

See, also, 2 John Adams' Works, 525, appendix.

1765. John Adams, in his argument on the memorial of Boston to the governor and council, said (Quincy Reports, 200):

"The stamp Act, I take it, is utterly void, and of no binding force upon us; for it is against our rights as men, and our privileges as Englishmen. An act made in defiance of the first principles of justice; an act which rips up the foundation of the British Constitution, and makes void maxims of 1800 years standing.

"Parliaments may err; they are not infallible; they have been refused to be submitted to. An act making the King's proclamation to be law, the executive power adjudged absolutely void."

1776. John Adams' letter to William Cushing, June 9, 1776 (9 Adams' Works, 390-1):

"You have my hearty concurrence in telling the jury the nullity of acts of parliament, whether we can prove it by the jus gladii or not. I am determined to die of that opinion, let the jus gladii say what it will."

1765. Hutchinson, the Royal Chief Justice of Massachusetts, in 1765, speaking of the opposition to the stamp act, said (Quincy, Mass. Reports, 527):

"The prevailing reason at this time is, that the act of Parliament is against Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void."

On September 12, 1765, Hutchinson wrote (Quincy, 441):

"Our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is ipso facto void."

On February, 7, 1766, Cushing, one of the Royal Associate Justices, wrote Chief Justice Hutchinson upon the question whether the courts should be opened without stamps (Quincy, 527-8):

"IT's true it is said an act of Parliament against natural equity is void. It will be disputed whether this is such an act. It seems to me the main question here is whether an act which cannot be carried into execution should stop the course of justice, and that the judges are more confined than with respect to an obsolete act. If we admit evidence unstamped ex necessitate Q. if it can be said we do wrong."

1792. In *Bowman v Middleton*, 1 Bay (South Carolina) 252, 254, it was held that an act of the Assembly of South Carolina passed in 1712, transferring a freehold from the heir-at-law of one Nicholls, and also from the eldest son and heir of John Cattel,

deceased, and vesting it in a second son, William Cattel, was "Null and void * * *," "such an act being against common right and the principles of Magna Charta."

Prior to the American Revolution so far were the English Courts from sustaining the later doctrine of parliamentary absolutism, that in the reign of James II, ten of the twelve judges of England held that the King was an absolute sovereign. The change from Royal to Parliamentary absolutism shows that constitutional law is a living, growing thing.

In *Godden v Hales*, 2 Shower, 475, headnote:

"The king of England might formerly dispense with any law, and therefore on a conviction on the 25 Car. 2.c.2. for holding the office of colonel, without having taken the oaths, if the king granted the convict a dispensation, he might plead it in bar to an action by the informer for the penalty."

The Lord Chief Justice in delivering the opinion of all the Justices of the King's Bench, as well as of all the justices of the Common Pleas and Exchequer, except Street and Powell, said (478):

"the Kings of England were absolute sovereigns; that the laws were the king's laws; that the king had a power to dispense with any of the laws government as he saw necessity for it; that he was sole judge of the necessity; that no act of parliament could take away that power; that this was such a law.""

The views of Coke, his associate Justices and their patriotic successors prior to the American Revolution that Parliament was not omnipotent and that it was the duty of all courts to refuse to execute acts of Parliament in contravention of the natural rights and liberties of free Britons, were adopted not merely by patriotic leaders like John Adams, Samuel Adams and James Otis, but by Colonial legislatures, colonial and town conventions, and innumerable colonial town meetings during a long series of years prior to 1776.

James Otis drafted the address of the colonial convention of 1765, or stamp act congress, to the King, saying (Tudor's Life of James Otis, 227):

"To the English constitution these two principles are essential, the right of your faithful subjects freely to grant to your Majesty, such aids as are required for the support of your government over them, and other public exigencies; and trial by their peers. By the one they are secured from unreasonable impositions, and by the other, from arbitrary decisions of the executive power."

The congressional petition to the House of Commons says (Tudor's Life of James Otis, 228):

"By these means, we seem to be in effect unhappily deprived of two principles essential to freedom, and which all Englishmen have ever considered as their best birthrights, that of being free from all taxes but such as they have consented to in person, or by their representatives and of trial by their peers."

1 Samuel Adams' Writings (Cushings ed.), In-

Instructions of the Town of Boston to its representatives in the General Court, September, 1765 (pp. 8-9):

"But we are more particularly alarmed and astonished at the act, called the stamp act, by which a very grievous and we apprehend unconstitutional tax is to be laid upon the Colony.

"By the Royal Charter granted to our ancestors, the power of making laws for our internal government, and of levying taxes, is vested in the General Assembly: And by the same charter the inhabitants of this province are entitled to all the rights and privileges of natural free born subjects of Great Britain: The most essential rights of British subjects are those of being represented in the same body which exerciseth the power of levying taxes upon them, and of having their property tried by juries: These are the very pillars of the British Constitution founded in the common rights of mankind."

1 Samueal Adams' Writings (Cushing's ed.),
Answer of the House of Representatives of Massachusetts to the Governor's Speech, October 23, 1765 (pp. 16-7):

"You are pleased to say, that the stamp act is an act of Parliament, and as such ought to be observed
* * * We hope we may without offence, put your Excellency in mind of that most grievous sentence of excommunication, solemnly denounced by the church, in the name of the Sacred Trinity, in the presence of King Henry the Third, and the estates of the realm against all those who should make statutes, or observe them, being made contrary to the liberties of the Magna Charta. We are ready to think that those zealous advocates for the constitution usually compared their acts of Parliament with Magna Charta; and if it ever happened that such acts were made as infringed upon the rights of that charter, they were always repealed. We * * * cannot but be surprised at an intimation in your speech, that they will require a submission to an act as a preliminary to their granting relief from the unconstitutional burdens of it * * * .

"The Parliament has a right to make all laws within the limits of their own constitution; they claim

no more. Your Excellency will acknowledge that there are certain original inherent rights belonging to the people, which the Parliament itself cannot divest them of, consistent with their own constitution: among these is the right of representation in the same body which exercises the power of taxation. There is a necessity that the subjects of America should exercise this power with-in themselves, otherwise they can have no share in that most essential right, for they are not represented in Parliament, and indeed we think it impracticable."

And further (p.18):

"The right of the colonies to make their own laws and tax themselves has never been, that we know of, questioned; but has been constantly recognised by the King and Parliament. The very supposition that the Parliament, through the supreme power over the subjects of Britain universally, should yet conceive of a despotic power within themselves, would be most disrespectful * * * * *."

And further (pp. 19-20):

"They complain that some of the most essential rights of Magna Charta, to which as British subjects they have an undoubted claim, are injured by it:
* * * that it may be made use of as a precedent for their fellow subjects in Britain for the future, to demand of them what part of their estates they shall think proper, and the whole if they please that it invests a single judge of the admiralty, with power to try and determine their property in controversies arising from internal concerns, without a jury, contrary to the very expression of Magna Charta; that no freeman shall be amerced, but by the oath of good and lawful men of the vicinage; that it even put it in the power of an informer to carry a supposed offender more than two thousand miles for trial; and what is the worst of all evils, if his Majesty's American subjects are not to be governed, according to the known stated rules of the constitution, as those in Britain are, it is greatly to be feared that their minds may in time become disaffected."

1 Samuel Adams' Writings (Cushing's ed.),
Resolutions of the House of Representatives of

Massachusetts, October 29, 1765 (pp. 23-6):

"Whereas the just rights of his Majesty's subjects of this Province, derived to them from the British Constitution, as well as the royal charter, have been lately drawn into question: in order to ascertain the same, this House do unanimously come into the following resolves:

1. Resolved, That there are certain essential rights of the British Constitution of Government, which are founded in the law of God and nature, and are the common rights of mankind: therefore,

2. Resolved, That the inhabitants of this Province are unalienably entitled to those essential rights in common with all men: and that no law of society can, consistent with the law of God and nature, divest them of those rights.

3. Resolved, That no man can justly take the property of another without his consent; and that upon this original principle, the right of representation in the same body which exercises the power of making laws for levying taxes, which is one of the main pillars of the British Constitution, is evidently founded.

4. Resolved, That this inherent right, together with all other essential rights, liberties, privileges and immunities of the people of Great Britain have been fully confirmed to them by Magna Charta, and by former and by later acts of Parliament.

5. Resolved, That his Majesty's subjects in America are, in reason and common sense, entitled to the same extent of liberty with his Majesty's subjects in Britain. * * *

11. Resolved, That the only method whereby the constitutional rights of the subjects of this Province can be secure, consistent with a subordination to the Supreme power of Great Britain, is by the continued exercise of such powers of government, as are granted in the royal charter, and a firm adherence to the privileges of the same.

12. Resolved, as a just conclusion from some of the foregoing resolves, That all acts made by any power whatever, other than the General Assembly of this Province, imposing taxes on the inhabitants, are infringements of our inherent and unalienable rights as men and British subjects, and render void the most valuable declarations of our charter."

1. Samuel Adams' Writings (Cushing's ed.), House of Representatives of Massachusetts to the speakers of other Houses of Representatives, February 11, 1768 (pp. 185-6):

"That in all free states the constitution is fixed; and as the supreme legislative derives its power and authority from the constitution, it cannot overleap the bounds of it without destroying its own foundation * * * That it is an essential unalterable right in nature, ingrafted into the British constitution, as a fundamental law and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired his own, which he may freely give, but cannot be taken from him without his consent: * * *

"It is moreover their humble opinion, which they express with the greatest deference to the wisdom of the Parliament that the acts made there imposing duties on the people of this province with the sole and express purpose of raising a revenue are infringements of their natural and constitutional rights because as they are not represented in the British Parliament his Majesty's Commons in Britain by those acts grant their property without their consent."

2. Samuel Adams' Works, Report adopted by Town of Boston, November 20, 1772 (pp. 356-7):

"The absolute rights of Englishmen, and all freemen in or out of civil society, are principally, personal security, personal liberty and private property. * * *

"The legislative has no right in absolute

arbitrary power over the lives and fortunes of the people : Nor can mortals assume a prerogative, not only too high for men, but for Angels; and therefore reserved for the exercise of the Deity alone - *

* *
 "The Supreme power cannot justly take from any man, any part of his property without his consent, in person, or by his representative."

See, also: 1 Samuel Adams' Writings, 64-5. Letter to Dennys DeBerdt, December 20, 1765.

1 Samuel Adams' Writings, 90-2, Letter of Town of Boston to Dennys DeBerdt, October 22 , 1766.

1 Samuel Adams' Writings, 135-6, 139. 147, Letter House of Representatives to Dennys DeBerdt, January 12, 1768.

1 Samuel Adams' Writings, 156-7, Letter House of Representatives to Earl of Shelburne, January 15, 1768.

1 Samuel Adams' Writings, 171, Letter House of Representatives to Marquis of Rockingham, January 12, 1768.

1 Samuel Adams' Writings, 174, Letter House of Representatives to Lord Camden, January 29, 1768.

- 1 Samuel Adams' Writings, 180, Letter
House of Representatives to Earl
of Chatham, February 2, 1768.
- 1 Samuel Adams' Writings, 190, Letter
House of Representatives to Conway,
February 13, 1768.
- 1 Samuel Adams' Writings, 196, Letter
House of Representatives to Lords
Commissioners of the Treasury,
February 17, 1768.
- 1 Samuel Adams' Writings, 241-4. The
Convention of Mass. Town to Denny's
DeBerdt, October 10, 1768.
- 3 Samuel Adams' Writings, 68, Resolutions
Town of Boston, November 5, 1773.
- 3 Samuel Adams' Writings, 90, Letter
Committee of Correspondence of
Mass. to Benjamin Franklin, March
31, 1774.
- 1 Samuel Adams' Writings (Cushing's Ed.), Letter of
November 11, 1765 (p.28):

"So that this charter" (of Massachusetts) "is
to be looked upon, to be as sacred to them as Magna
Charta is to the people of Britain; as it contains
a declaration of all their rights founded in natural
justice.

"By this charter we have an exclusive right to make laws for our own internal government and taxation."

And further (p.27):

"In this charter, * * * there was a greater sacredness, than in those of the corporations in England: because those were only acts of grace, whereas this was a contract, between the King and the first patentees; They promised the King to enlarge his dominion, on their own charge, provided that they and their posterity might enjoy such and such privileges. * * * Thus we see that whatever government in general may be founded in, ours was manifestly founded in compact."

And further (p.30):

"The Stamp Act * * * is looked upon as an infringement of the rights of Magna Charta, to which the colonists as free subjects have an undoubted claim."

- 1 Samuel Adams' Writings (Cushing's ed.), Letter to John Smith, December 20, 1765 (p.55):

"No man in the State of nature can justly take another's property without his consent. It is an essential part of the British Constitution that the Supreme power cannot take from any man any part of his property without his consent in person or by his representative."

- 1 Samuel Adams' Writings (Cushing's ed.), Letter to Denny's DeBerdt, December 20, 1765 (p.64):

"They hold themselves entitled to all the inherent, unalienable rights of nature, as men - and to all the essential rights of Britons, as subjects. The common essential rights of law of England, and the grand leading principles of the British Constitution have their foundation in the laws of nature and universal reason. Hence one would think that British rights, are in a great measure, unalienably,

the rights of the colonists, and of all men else."

And further (p.65) -

"The primary, absolute, natural rights of Englishmen as frequently declared in acts of Parliament from Magna Charta to this day, are personal security. personal liberty and private property, and to these rights the colonists are entitled by charters, by common law and by acts of Parliament. Can it then be wondered at that the act of levying stamp duties upon the colonies should be astonishing to them, since in divers respects it totally annihilates these rights. It is a fundamental principle of the British Constitution that the Supreme power cannot take from any man any part of his property without his consent in person or by representation."

In connection with these citations attention should also be called to

Loan Association v Topeka, 20 Wallace, 655, in which the Supreme Court of the United States held that a statute authorizing a municipality to issue bonds in aid of the manufacturing enterprise of individuals was void, because the taxes necessary to pay the bonds, would, if collected, be a transfer of the property of individuals to aid in the project of gain and profit to others and not for a public use. The Court say (p.663): "The theory of our governments State and National is opposed to the deposit of unlimited power anywhere." Mr. Justice Clifford dissented upon the ground that the legislative authority was absolute except so far as it was restricted by written constitutions.

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APPENDIX E.

QUESTIONNAIRES AND RESOLUTIONS
OF THE NEW YORK BAR 1915.

Questionnaires in the following form were sent to over 180 leaders of thought and action, who collectively asserted in 1912 that judicial annulment is archaic, unique or obsolete.

MY DEAR SIR:

The New York State Bar Association Committee upon the duty of Courts to refuse to execute statutes in excess of or in contravention of the fundamental law, has learned that two out of our last three presidents, as well as many eminent judges and law school professors have written books or pamphlets stating that the power the American Courts have exercised and do still exercise in refusing to enforce unconstitutional law is alleged to be unique and peculiar to the two Americas.

The Committee is desirous of ascertaining the historical accuracy or inaccuracy of the view above set forth in order that it may report the truth and the whole truth in relation thereto to the State Bar Association at its next meeting.

To those who think that the practice of refusing to enforce laws in excess of or in contravention of the fundamental/

fundamental law is unique and peculiar either to this country or to North America and South America we submit these questions:

1. Prior to the French Constitution of 1791, which was followed by the constitutions of Austria, Belgium, Italy and Switzerland, prohibiting courts from passing upon the validity of legislation (Judge Oscar Hallam, Judicial Power to Declare Legislative Acts Void, 48 American Law Review, 245-7), was there or was there not throughout the continent of Europe a prevalent idea that law was handed down from custom, and that where radical legislative innovations were proposed in derogation of those customs they were treated by the then court of last resort as void (a) during the middle ages as in contravention of the ecclesiastical liberties or privileges of the church, and (b) prior to the French Revolution as in derogation of the natural rights theory of law?

2. Has or has not the introduction of conscription for military service been generally followed by constitutional restrictions upon the power of courts to enforce fundamental laws by refusing the enforcement of statutes in derogation thereof? Has not the increase of arbitrary power based upon military force been generally followed by a diminution of such liberties as the courts theretofore preserved?

3. Have you considered Thomas Jefferson's view that prior to the adoption of the federal constitution state laws in contravention of the articles of confederation were not enforceable (4 Life and Works of John Adams, 579-80, note)? Have you considered the decision of the U. S. Supreme Court in 1809 unholding Jefferson's view that a state law in contravention of the articles of Confederation was unenforceable (U. S. v. Peters, 5 Cranch, 115, 136-141)? Have you considered President Madison's refusal to prevent the execution of this judgment, and the House of Representatives and eleven states' refusal to entertain Pennsylvania's appeal for a constitutional amendment to prevent the Supreme Court from declaring any more state laws to be unconstitutional (Ames, State Documents on Federal Relations, Nos. 22-25)?

4. Have you considered John Adams' view that the 13 United States had established by the right of the sword (9 John Adams' Works, 390-1) the correctness of Lord Coke's view that acts of parliament in derogation of the rights of Englishmen were void and that the courts should refuse to enforce them (Quincy, Mass. Reports, 200, 441, 474, 521-7; 1 Henry's Life of Patrick Henry, pp. 79-106; 2 John Adams' Works, 525)?

5. Have you considered the many Privy Council cases prior to the American Revolution, which refused to/

to execute Colonial laws (Colonial Appeals to the Privy Council. Schlesinger, 28 Political Science Quarterly, pages 279-297, 433-50; Winthrop v. Lechmere, 1 Thayer's Cases on Constitutional Law, 34, 37-39; 5 Pennsylvania Statutes at Large, 735-7)?

6. Have you considered the Privy Council, Commonwealth of Australia, Supreme Court of Canada, Supreme Court and Court of Appeals of New Zealand, and Indian decisions since the American Revolution, refusing to execute Dominion, Commonwealth, State and Colonial laws, and even one Legislative Act of the Governor General of India in council, as ultra vires? What, if any, is the difference between the highest court of an English Dominion or Commonwealth refusing enforcement of an act of the Dominion, Commonwealth, State or Colonial Parliament as ultra vires, and the Supreme Court of the United States refusing enforcement of an act of Congress or of a state Legislature as unconstitutional?

Yours very sincerely,

HENRY A. FORSTER,

Chairman.

Only six of Mr. Holder's disciples have attempted to champion the views on which so much of the campaign of 1912 was based. Four of their letters follow.

Some of those answering, criticize the scope of the inquiry directed by the Association, the form of your Committee's questionnaires, as well as your Committee's attitude, generally adding that they favor making constitutional amendments easier; that they favor eliminating the Fourteenth Amendment or due process of law from the Constitutions; also that they favor the recall of decisions. All the critical letters or parts of letters follow.

In some instances, the authors of books or pamphlets, containing the views above set forth, forgot what they had written in 1912.

Some letters show that their writers have wholly changed their minds since 1912.

A distinguished historian and university professor writes:

I beg to acknowledge your circular letter relative to the investigation of the relation of the courts to legislation.

It is a subject which has been much in my mind in the last few years, and I have gathered various materials and impressions upon it. That material is too voluminous, and time is too short, for me to undertake anything/

anything like a review of the subject, but I can answer off-hand and without consulting data, some of your questions.

If I understand the trend of your point of departure, you assume that previous to the American Revolution there was in the world a principle with regard to the relation of legislative power and judicial power which my small knowledge of the history of law and jurisprudence does not verify. The main theory of government was that within each state there was one supreme power - whether King, Council or Diet. In England, for example, the judicial power was part of the royal authority, and so of the legislative. That a court, which was an emanation of the sovereign, would ever set aside a statute which was also the emanation of the sovereign, is totally contrary to that notion of power; and it may be observed that the world now seems to tend toward a restoration of that principle, - the referendum and recall of judicial decisions acting together would practically come to that point. The *lits de justice* in France is a sufficient proof that the courts did not consider that they could contravene any edict proceeding from the superior law-making power.

An apparent exception was brought about by Montesquieu's entirely mistaken notion of a division of powers in the government of England, in 1730 or thereabouts. No matter what Coke may have said, and in spite of the handful of tentative decisions or opinions by/

by English judges, the English courts were not a co-ordinate power having equal authority to judge of the validity of the statutes. The idea of the division of powers has much affected (and for the most part harmfully) modern political organization - particularly in the United States.

Another deviation from the general principle of unity was brought about by federal government. In the so-called Holy Roman Empire, the royal legislative power was practically annulled, but not through any action whatever of the courts. I believe I am right in saying that neither the Hofgericht nor the Reichskammergericht ever attacked the validity of an imperial ordinance, or of a vote of the Diet; nor so far as I am aware, did they ever interfere with the legislation of the states of the empire. The only practical application of the setting aside of statutes because controlled by some superior law, down to the Revolution, was in the relations of the English colonies with the Privy Council. Here the process seems to have sprung from the control of charters of commercial companies and other corporations, as cities and universities. Then the principle of ultra vires came in, and when such corporations grew to be little world governments in a distant part of the world, the principle followed them, and two of the colonial charters were set aside by the courts (Virginia (1624) and Massachusetts Bay/

Bay (1684)). There were also occasional appeals from the colonial courts to the Privy Council, but they seem to have accomplished little, and I have never been able to find an instance of a colonial statute set aside because not in accordance with the colonial charter. The right to veto colonial acts for any reason that seemed good to the English authorities, obscures if it does not exclude, any right to set laws aside as unconstitutional. The action of the Privy Council in such cases was, with few exceptions, never judicial but executive.

The eight to ten cases in which state courts set aside state statutes between 1775 and 1789 are, in my judgment, the first definite application of the principle of judicial refusal to acknowledge the validity of a statute because inferior to another statute made by the same community. That is a very significant distinction from all colonial procedure. Writers on this subject seem totally to have overlooked the fact that, even including the Rhode Island Paper Money case, every one of these issues was raised upon the irregular and temporary conditions of a civil war; every case but the Rhode Island case was based upon the special and abnormal status of Loyalists. Nevertheless there can be no doubt that those cases were in the minds of the framers of the Constitution; and that they expected the new federal courts to disallow state statutes because not/

not in accordance with the federal Constitution. Notwithstanding recent efforts to prove the contrary, the history of the Convention firmly establishes this contention. Inasmuch as the Supreme Court, previous to the Dred Scott decision of 1857, never set aside an act of Congress except in the obiter dictum of 1803 and the Ferreira case of 1853 (both touching its own jurisdiction), we may fairly conclude that the Supreme Court thought the power one to be exercised only at long intervals, and only in cases of grave import, so far as federal legislation was concerned.

The practice of the three other federations of the English stock, and some of the relations of England with its colonies, are only lessons learned from practice in the United States, and throw no light upon the fundamental principles of the British Empire previous to 1800. The action of France, and later of Switzerland and other countries, prohibiting judicial annulment of statutes, was not intended to repeal a previous practice or principle, but to prevent the application of the new American idea to governments more or less resembling the government in the United States. * * *

A state leader of a great political party writes:

I suppose your circular letter of June 20th is intended to elicit a reply.

(1) In the middle ages the courts sometimes held ultra/

ultra vires the royal ordinance or statutes invading the privileges of the church or the authority of the courts. Such decisions generally ran counter to democratic tendencies of the times.

(2) The extension of parliamentary government in western Europe has synchronized with the limitation of the powers of the courts. It so happens that limitation of autocratic and ecclesiastic power has been accompanied by the levying of democratic military forces.

(3 and 4) Surely the practice of American courts in holding void statutes in violation of the Constitution is familiar to even those of us who are not lawyers by profession.

(5) I know nothing of these cases.

(6) Those of us who have been in the habit of asserting that the powers of American courts were unique have referred primarily to the powers of English and other European courts. Do you mean that the Dominion courts in Canada and New Zealand and the high courts in Australia (I think we may consider British India negligible) exercise a jurisdiction in constitutional cases identical with that of the American courts?

A prominent lawyer and chairman of an important committee in his party writes:

Responding/

Responding to your circular letter of June 10th, issued as Chairman of the New York State Bar Association Committee, permit me, also, to ask a question.

In my article I made this statement, "The difference therefore between laws which are constitutional and unconstitutional, between what is 'due process of law' and what is not, in such cases involving the 'police power,' does not depend upon any language in the Constitution. These cases are decided solely upon the opinion of the court as to whether the law is necessary for the general welfare and hence authorized by the 'police power.'"

The power of the court thus exercised is not for the enforcement of any definite principle or custom, but the court acts as a reviewing body over the decision of the legislative body as to what is sound public policy. If the Constitution had read that Congress shall have the power to pass all laws necessary and proper but that Congress shall have no power to pass any bad laws, this necessarily would require some reviewing body such as the Supreme Court to pass upon what was a bad law. You might think that such complete subjection of the legislature to the judiciary would be unprecedented, yet how different is this from the power exercised in construing the phrase "due process of law"? Following this line of reasoning, the question I beg to ask is: "When the American courts refuse to/

to enforce laws not because of constitutional prohibition of the law in question, nor because it is in conflict with any established principle or custom, but because in the judgment of the Court the law does not present sound or accepted public policy - is this power not unique and peculiar?

Another question: When one considers the phrase "due process of law" as a constitutional restriction, is this not inexact? Whatever substance has been given this phrase (which in all candor is very little) has been given it by the judiciary. To refer to such a phrase as a constitutional restriction binding the courts and in the next breath to admit that its sole meaning is given it by the courts, seems to me to show that it is not a constitutional restriction at all. A appoints B his agent and gives him the power to do whatever in the judgment of C is necessary and proper, the limitation imposed upon B is not A's judgment (i.e., a constitutional prohibition) but C's judgment, and not C's judgment of what A wishes, but C's own opinion.

Pardon me for going into this A, B, C discussion, but much argument concerning the power of the Courts to declare laws unconstitutional is confused by the joint consideration of the power of the Courts to enforce a specific constitutional prohibition and the power of the Court to superimpose its own judgment on that of the legislature. With the former there is little cause for complaint, with the latter there is very much cause.

A member of the Executive Committee of a great national party writes:

I am, however, firmly of the personal opinion that the theory that the position of the American Courts when they have refused and do still refuse to enforce unconstitutional laws is both unique and peculiar as compared to the procedure of the continental courts.

A prominent lawyer and distinguished law reformer writes:

May I add that from my own standpoint the question-
naise is not sufficiently important to justify the effort. Our learned Bar is apparently interested in two questions: First, usurpation by the courts; second, whether usurpation is unique. I long ago made up my mind that it was not usurpation, and I do not care whether it is unique. The main question is whether the system is one which practically works to the satisfaction of the people. That question will not be answered by any amount of learning devoted to answering your academic questions. If I were going to take up the question of the relation of the courts to constitutional liberty, I should want to know whether it is advisable that our Constitution should contain such vague terms as "due process of law", which the courts themselves cannot define and do not define, and whether it/

it is advisable to leave it to the courts to determine whether any given law shall stand or fall when the court applies to it the test of a rule which the court itself cannot define, and which the legislator cannot know in advance. That, I take it, is the real question. It has two sides and on it opinions may differ. Your inquiries, however, seem to me to involve irrelevant learning of no special advantage either to the Bar or to the community, and the answers to which will serve no useful purpose.

A university professor and prominent law reformer writes:

I have received your communication of Sept. 24th with reference to the power of the courts to refuse to enforce unconstitutional laws and thank you for it. In my article to which you refer I do not assert that this power is in itself unique and peculiar. What I do assert is that the power as assumed by the courts to veto legislative acts under the XIV Amendment as not being "due process of law," is unjustified by the historical meaning of this phrase or by any of the rules of statutory construction.

I think your inquiries are in grave danger of missing the main point raised by the proposed recall of judicial decisions, and of going off on a side issue. I would suggest that if you really desire to report the truth/

truth and the whole truth to the State Bar Association, you give some attention at least to the historical accuracy or inaccuracy of the interpretation put on the XIV Amendment which is the great source of abuse and usurpation of an unintended and unjustifiable discretionary veto on legislation.

A distinguished Law School professor writes:

I am very much obliged to you for your very instructive letter of May 22nd. I hope that I may find time to answer your letter at more length later. Much can be and has been said on both sides of the question which you raise. I presume you have observed most of the articles referred to in "The Judicial Bulwark of the Constitution," by Frank E. Melvin in The American Political Science Review for May, 1914, page 167. Without attempting to discuss in detail the points you raise, I suggest that most of the illustrations which you put are cases which involve conflict between legislation of a sovereign body and that of a body of limited powers. It does not seem to me that such illustrations are at all conclusive. The difference as to which you ask is that in one case legislation of a sovereign legislative body is declared unconstitutional.

While your historical inquiry is of great interest, I am myself much more interested in the problem as to whether the exercise of the power in question, in ever increasing/

increasing degree, by courts composed entirely of members of a profession prone to be conservative does not unduly hamper democracy in the interest of privileged classes. Should the demand upon my time make it possible, I should hope to write you at greater length later.

A prominent law reformer and Law School professor writes:

I have been in receipt from time to time of a letter addressed to those who think that the practice of refusing to enforce laws in excess of or in contravention of the fundamental law is unique and peculiar to this country or to North America and South America.

I am very grateful for this letter and the historical information and references therein contained.

I should like to point out, however, that I do not fall in the class of persons to whom your letter is addressed. I think that I have on no occasion expressed the view that the practice of our courts in declaring laws void was unique or peculiar. My idea is that it is a function performed by some governmental body in practically all well-constituted governments. For instance, in England, a similar function is performed by the House of Lords. That is so constituted as to represent property interests. It has had until recently an absolute veto power on all laws passed by the/

the Commons. Naturally any action by the courts in declaring laws void became entirely unnecessary.

In this country, where we have had no second chamber so constituted as to represent property interests and the conservative elements, we have been forced to work out a similar function in another way, namely, by prohibition in our constitutions and the action of courts in declaring laws void which contravene those provisions. All this you will find set forth somewhat more at length in Chapter XVI of my little book on Unpopular Government in the United States.

The recall of judicial decisions raises precisely the same question as was raised by the recent House of Lords Act in England. The movement for some process for steam rolling the judicial veto of our Supreme Courts is precisely the same as the successful agitation in favor of a process of steam rolling the veto of the House of Lords.

Whether other countries work out the protection of property interests against a popular legislative chamber by the legislative veto of a second chamber branch of the legislature or by constitutional prohibitions and their enforcement by judges, seems to me by itself a futile inquiry as compared with the merits of the real question "Should property interests be protected from the action of a popular assembly; how far should they be protected, and what is the best method of such protection?"

A distinguished Law School professor, political reader and author writes:

Your letter of May 22nd is received. I have never taken very much interest in the question whether the power of our courts to declare acts which they believe contrary to the Constitution, void, is or is not a power which is "unique and peculiar to the two Americas." You evidently have addressed the letter to me under a misapprehension of my opinion. I have always believed that whatever the practice in other nations or whatever the opinion on this question, of those who drafted the Constitution of the United States and the earlier state constitutions, the position of Marshall, in *Marbury v. Madison*, is sound and indeed vital to our preservation as a federal state. * * * I believe that there is no answer to the position that if the Constitution says one thing and the legislature says another, that the judges must follow the Constitution. I suppose that you addressed the letter to me because I am in favor of what has been miscalled the Recall of Judicial Decisions on constitutional questions. I believe that if a law contrary to the Constitution is desired by the people who have made the Constitution, there is no reason why they should not, after due deliberation, have the law which they desire and to that extent suspend the Constitution which they themselves have adopted. It is merely a method of pro tanto amending the Constitution/

Constitution. I do not suppose that you or any of your Committee desire to place the judge in the position of having the last and final say as to what should be our fundamental law. Under our system of government, whether you prefer the machinery of formal amendment or of the so called recall of judicial decisions on constitutional questions, you must, unless you desire to establish a judocracy for a democracy, allow the people to determine their fundamental law.

I am much interested in the references which you give in your letter, on the purely historical question at issue, that is, whether the doctrine is peculiar to this country and whether Marshall took a position which was essentially new. It appeals to me that if your Committee desire to come to a conclusion which will be generally received as correct, your questions should not be so framed as to give the recipient the idea that you have already conclusively made up your mind. * * *

The distinguished author of Majority Rule and the Judiciary (by William L. Ransom), which book states (pp. 28-9): "Under the American constitutional system, the most important issues of sovereign powers and policies are permitted to depend on the outcome of private suits between individuals - issues that in any other government could not be raised in any court at all," writes:

On/

On my return to New York after an extended absence in the Canadian woods, I find at my office several copies of your circular inquiry in behalf of a Special Committee of the New York State Bar Association on constitutional topics, of which Special Committee you are the head. I do not know of anything that I have ever written or publicly said which could bring me within the purview of the first paragraph of your circular letter, and therefore do not undertake reply thereto or comment thereon. I do not recall that I have ever written or said anything predicated upon assumption of the correctness or incorrectness of the view which you challenge. I am greatly interested in the collection of authorities which you have made upon the subject, and am obliged to you for sending me a copy of your circular letter.

The President:

What is your pleasure with the report and the resolution?

Everett P. Wheeler, of New York:

I move the report be accepted, the resolutions be adopted and the committee continued.

Alfred Hayes, of Ithaca:

Mr. President, I would like to state why I will vote against the second resolution. The statement made here is that this is the only peaceful means of avoiding/

avoiding conflict between the Constitution and the rights and duties of the federation and the legislation in forty-nine legislative units, as well as to uphold and enforce the bill of rights. This is untrue. This is due not only to the failure of this committee to observe the distinction between those two things, the problems of a federal organization and the enforcement of a bill of rights in the case which they cite, because practically none of the cases can be pretended to relate to the upholding of the bill of rights, but also to their failure to observe the limits of their own resolution, which was to examine the historical origin of the subject and to their making a recommendation which is purely political in character. I submit that an untrue statement is made, because so far as the bill of rights is concerned the proposition is not identical with the question of the relative rights of a federation and the units making it up. The federal organization is not involved, and as to a bill of rights it is obviously untrue in view of such considerations as those presented in a paper which I had the pleasure of hearing, for example, at the recent joint meeting of the American Association of Law Schools and the Association of Political Science at Chicago, by Professor Dodd of the University of Illinois, as to political as distinguished from judicial safeguards of the fundamental liberties and rights of the people. I wish to say/

say, however, that this report is a very valuable presentation of historic material and substantially it is conclusive on the majority of points involved. I think it regrettable that the committee should take a political position which really manifests a lack, I take it, of appreciation of what was the real significance of the movement with reference to the recall of judicial decisions. I shall vote against this second resolution, not because of general lack of sympathy, but because I think such a sweeping and inaccurate statement ought not to receive the sanction of a body which is fair minded and regards all sides of a question of this kind.

Francis Lynde Stetson, of New York:

Mr. President, I ask for a division of the subject, first, on the acceptance of the report and then a vote on the resolution.

The President:

The question is on the acceptance of the report.

The report was duly accepted.

The President:

Now then on the resolution, are you ready for the resolution. I will submit the first resolution. It reads:

"Resolved, That in federations possessing a written fundamental law, it is the duty of the Courts to uphold the fundamental law as against legislation in contravention thereof by refusing to/

to enforce, as ultra vires or unconstitutional, all statutes in excess of or in contravention of the fundamental law, save and except where the written fundamental law of the federation confers upon the Federal Council, or some body with the powers of a Federal Council, plenary and exclusive jurisdiction to determine conflicts between the fundamental law and ordinary statutes, as well as to enforce the bills of rights."

Those in favor of the adoption of that resolution will say aye.

The resolution was duly adopted.

The President:

The second resolution reads:

"Resolved, further, That in a Federal democratic republic, with forty-nine legislative units (one federation and forty-eight States), either judicial review or else a supreme Federal Council with plenary power to revise, veto, annul or suspend all legislation, both Federal and State, either in whole or in part, is the only peaceful means of resolving the inevitable conflicts between the Constitution and the rights and duties of the federation and the legislation in forty-nine legislative units, as well as to uphold and enforce the bill of rights."

Francis Lynde Stetson, of New York:

Mr. President, I trust in view of the importance of this particular resolution that we may have ten minutes allowed for discussion. I would like for my own information to get a little further statement on the point, if the gentleman from Ithaca is correct. I do not want to be put in a wrong category.

Henry A. Forster, of New York:

Mr President, the situation is practically this: There have been two alternatives that have been worked out in different countries that are federations, one is what we call judicial review, and the other is federal council which might act in a double capacity as in the English government or German Empire with a federal council with plenary powers, or as in the British Empire a court of last resort for the colonies, and now for Ireland. That in Germany is a sort of conciliation court of constitutional dispute. The only scheme that I have ever heard agitated anywhere else is the Australian scheme. The court review was tried in Australia and caused a good many people to be dissatisfied, but the voters of Australia refused on referendum to submit to the giving of plenary power to the Federal Parliament. Therefore this may be and undoubtedly is a direct resolution against the recall of judicial decisions to which this Association by a large majority/

majority has previously committed itself.

Charles A. Boston, of New York:

Mr. President, I would like to ask Mr. Hayes whether he would have us understand that his objection to this resolution is the use of the word "only," whether he would have us understand that he thinks that there are other means of accomplishing the same end and whether one of these means is the popular recall of judicial decisions. I inquire for information only.

Alfred Hayes, of Ithaca:

My objection is primarily to the word "only" both because it involves a large political discussion and also because, while I did not myself, I think, have primarily in mind the idea of recall of decisions (I never have advocated that, though I have pointed out at Boston and elsewhere that it was merely a method of amending the Constitution by popular vote in a different form from the usual one as respects legislation involving the police power). I had in mind rather the use of the word "only" as being incorrect in ignoring all other methods. It seems to me an inaccurate statement of the effect of political safeguards. Thus, for instance, the report itself shows that the House of Lords being a body representative of the different classes in the community, largely a hereditary group of/

of property owners, is itself a sufficient protection. Mr. Dodd's paper to which I referred has no reference in it whatever to the recall of judicial decisions in dealing with political safeguards. I am reminded in answering the question of what Judge Riddell said to us at New York when it had been strongly asserted that if we did not have this particular means of protection, anarchy and confiscation would inevitably result. He said that no such result had occurred in Canada or in any other of those countries in which no such judicial power exists. I am not saying that our constitutional system may not be better. Being a professor of constitutional law I am not attacking constitutional law; I do not feel disposed to attack at all the judicial safeguards; I am saying that it is a mistake for this body to make a political statement of this kind, which is not consistent with political science because, undoubtedly, other forms of government do not find this method necessary. Germany does not, France does not, Great Britain does not. It is not an accurate statement to say it is the only means of safeguarding rights. I think the word "only" ought to be eliminated from the resolution for the sake of scientific accuracy if for nothing else.

Francis Lynde Stetson, of New York:

Mr. President I move to strike out the word "only" and/

and insert in lieu of "the only peaceful means" the words "the effective and preferable means."

Henry A. Forster, of New York:

May I ask what means you suggest?

Mr. Stetson:

I don't know any other, I know this is the effective one and the preferable one. I regard it as an effective one and the preferable one.

Charles A. Boston, of New York:

I second Mr. Stetson's motion.

The President:

The amendment is accepted by Mr. Boston representing the committee, the question is now on the adoption of the resolution.

The resolution was duly adopted.

The President:

The question is now on the third resolution:

"Resolved, further, That the experience of 134 years of Court review of unconstitutional or ultra vires laws has demonstrated that not only the citizens of the United States, but those of the British Empire and of several other countries as well, where there is no Federal Council with plenary power to veto, annul/

annul, repeal or suspend laws, prefer Court review to the establishment of a Federal Council with absolute power to veto, annul, repeal or suspend all or part of any legislation, State or Federal."

Are you ready for the question?

The resolution was duly adopted.

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